6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 121, 122, and 124

[EPA-HQ-OW-2022-0128; FRL-6976.1-01-OW]

RIN 2040-AG12

Clean Water Act Section 401 Water Quality Certification Improvement Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Following a careful reconsideration of the water quality certification rule promulgated in 2020, the Environmental Protection Agency (EPA or the Agency) is publishing for public comment a proposed rule revising and replacing the Agency's 2020 regulatory requirements for water quality certification under Clean Water Act (CWA) section 401. This proposed rule would update the existing regulations to be more consistent with the statutory text of the 1972 CWA; to clarify, reinforce, and provide a measure of consistency with respect to elements of section 401 certification practice that have evolved over the 50 years since the 1971 Rule was promulgated; and to support an efficient and predictable certification process that is consistent with the water quality protection and cooperative federalism principles central to CWA section 401. This proposal is consistent with the Executive order signed on January 20, 2021, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which directed the Agency to review the water quality certification rule EPA promulgated in 2020. The Agency is also proposing conforming amendments to the water quality certification regulations for EPA-issued National Pollutant Discharge Elimination System permits.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearing.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OW-2022-0128, by any of the following methods:

- Federal eRulemaking Portal: https://www.regulations.gov/ (our preferred method). Follow the online instructions for submitting comments.
- Email: OW-Docket@epa.gov. Include Docket ID No. EPA-HQ-OW-2022-0128 in the subject line of the message.
- Hand Delivery / Courier: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OW-2022-0128 for this rulemaking. Comments received may be posted without change to https://www.regulations.gov/, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lauren Kasparek, Oceans, Wetlands, and Communities Division, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202-564-3351; email address: *cwa401@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

Clean Water Act (CWA) section 401 provides states[1] and authorized tribes[2] with a powerful tool to protect the quality of their waters from adverse impacts resulting from the construction and operation of federally licensed or permitted projects. Under CWA section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into a "water of the United States"[3] unless the state or authorized tribe where the discharge would originate either issues a CWA section 401 water quality certification "that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307" of the CWA, or waives certification. 33 U.S.C. 1341(a)(1). When granting a CWA section 401 certification, states and authorized tribes are directed by CWA section 401(d) to include conditions, including "effluent limitations and other limitations, and monitoring requirements" necessary to assure that the applicant for a Federal license or permit will comply with CWA sections 301, 302, 306, and 307, and with "any other appropriate requirement of State law." *Id*. at 1341(d).

Congress originally created the state water quality certification requirement in section 21(b) of the Water Quality Improvement Act of 1970, which amended the Federal Water Pollution Control Act (FWPCA).[4] Congress granted states this certification authority in response to Federal agencies' failure to achieve Congress's previously stated goal of assuring that

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[1] The CWA defines "state" as "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands." 33 U.S.C. 1362(3).

[2] The term "authorized tribes" refers to tribes that have been approved for "treatment in a manner similar to a State" status for CWA section 401. *See* 33 U.S.C. 1377(e).

[3] The CWA, including section 401, uses the term "navigable waters," which the statute defines as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). This proposed rule uses the term "waters of the United States" throughout. EPA and the Corps recently published a proposed rule that would define the scope of "waters of the United States." *See* Proposed Revised Definition of "Waters of the United States." 86 FR 69372 (December 7, 2021). The agencies are currently interpreting "waters of the United States" consistent with the pre-2015 regulatory regime. The "pre-2015 regulatory regime" refers to the agencies' pre-2015 definition of "waters of the United States," implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

[4] Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91 (April 3, 1970).

federally licensed or permitted activities comply with water quality standards.[5] Two years later, Congress revised the Federal water quality protection framework[6] when it enacted the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the Clean Water Act or CWA).[7] In those Amendments, Congress placed the state water quality certification requirement in section 401, using "substantially section 21(b) of existing law," with relevant conforming amendments "to assure consistency with the [] changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." S. Rep. No. 92-414 at 69 (1971); *see also* H.R. Rep. No. 92-911 at 121 (1972) ("Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act."). Section 401's grant of authority to states and authorized tribes to play a significant role in the Federal licensing or permitting process is consistent with the overall cooperative federalism framework of the CWA, which provides states and authorized tribes with a major role in implementing the CWA, balancing their traditional power to regulate land and water resources within their borders with the need for a national water quality regulation.

EPA promulgated implementing regulations for water quality certification in 1971 (1971 Rule)[8] prior to enactment of the 1972 amendments to the CWA. In 1979, the Agency recognized the need to update its water quality certification regulations, in part to be consistent with the 1972 amendments. *See* 44 FR 32854, 32856 (June 7, 1979) (noting the 40 CFR part 121

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[5] S. Rep. 91-351, at 26 (1969) ("Existing law declares it to be the intent of Congress that all Federal departments, agencies, and instrumentalities shall comply with water quality standards. This declaration of intent has proved unsatisfactory. One basic thrust of S. 7 is to require that all activity over which the Federal Government has direct control-- . . . . federally licensed or permitted activity – be carried out in a manner to assure compliance with applicable water quality standards.")

[6] *City of Milwaukee v. Illinois*, 451 U.S. 304, 310, 317 (1981).

[7] Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.*

[8] 36 FR 8563 (May 8, 1971), redesignated at 36 FR 22369, 22487 (November 25, 1971), further redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32854, 32899 (June 7, 1979).

regulations predated the 1972 amendments). However, the Agency declined to update the 40 CFR part 121 regulations at the time because it had not consulted with other Federal agencies impacted by the water quality certification process, and instead developed regulations applicable to water quality certifications on EPA-issued National Pollutant Discharge Elimination System (NPDES) permits. *Id.*; *see e.g.*, 40 CFR 124.53 through 124.55. As a result, the 1971 Rule did not fully reflect the current statutory language, nor does it reflect or account for water quality certification practices and judicial interpretations of section 401 that have evolved over the past 50 years. Following the promulgation of the 1971 Rule, several seminal court cases have addressed fundamental aspects of the water quality certification process, including the scope of certification review and the appropriate timeframe for certification decisions. States have also developed and implemented their own water quality certification programs and practices aimed at protecting waters within their borders. During this time, the Agency supported state and tribal water quality certification practices and the critical role states and tribes play in protecting their waters under section 401.[9]

EPA revised the 1971 Rule in 2020.[10] The 2020 Rule did not update the regulations applicable to water quality certifications on EPA-issued NPDES permits but noted that the Agency would "make any necessary conforming regulatory changes in a subsequent rulemaking." 85 FR 42219. The 2020 Rule represented a substantive departure from some of the Agency's and certifying authorities' core prior interpretations and practices with respect to water quality certification. Moreover, the 2020 Rule deviated sharply from the cooperative federalism framework central to section 401 and the CWA. While the 2020 Rule did reaffirm some of the Agency's and the courts' prior interpretations, *e.g.*, the need for a potential point source

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[9] *See* Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) (hereinafter, 1989 Guidance); Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010) (hereinafter, 2010 Handbook) (rescinded).

[10] Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) (hereinafter, 2020 Rule). For further discussion on the 2020 Rule, including legal challenges, please see Section IV.C of this preamble.

discharge into a water of the United States to trigger the section 401 water quality certification requirement, the 2020 Rule rejected nearly twenty-five years of Agency practice and Supreme Court precedent regarding the appropriate scope of certification review, *i.e.*, rejecting "activity as a whole" for the narrower "discharge-only" approach. Additionally, the 2020 Rule introduced new procedural requirements that caused disruption to state and tribal certification programs that had evolved over the last half century. In this proposal, the Agency is returning to some of those important core principles, such as an "activity as a whole" approach to the scope of certification review and greater deference to the role of states and tribes in the certification process, while retaining (and adding) elements that provide transparency and predictability for all stakeholders.

On January 20, 2021, President Biden signed Executive Order 13990 directing Federal agencies to review actions taken in the prior four years that are, or may be, inconsistent with the policies stated in the order (including, but not limited to, bolstering resilience to climate change impacts and prioritizing environmental justice[11]). Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Executive Order 13990, 86 FR 7037 (published January 25, 2021, signed January 20, 2021). Pursuant to this Executive order, EPA reviewed the 2020 Rule. EPA identified substantial concerns with a number of its provisions that were at odds with section 401's cooperative federalism approach to ensuring that states and tribes are empowered to protect their water quality. *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541, 29542 (June 2, 2021) (identifying the Agency's concerns with the 2020 Rule). As a result, the Agency announced its intention to revise the 2020 Rule so that it is (1) well-informed by stakeholder input, (2) better aligned with the cooperative federalism principles that have been central to the effective implementation of the CWA, and (3) responsive to the environmental protection and other

[11] EPA has defined environmental justice as the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies." *See* https://www.epa.gov/environmentaljustice/learn-about-environmental-justice.

objectives outlined in Executive Order 13990. *Id.*

Five months after EPA's announcement of its intent to reconsider and revise the 2020 Rule, on October 21, 2021, a Federal district court remanded and, while EPA had moved for a remand without vacatur,[12] vacated the 2020 Rule. *In Re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA, 2021 WL 4924844 (N.D. Cal. October 21, 2021). The court found that vacatur was appropriate "in light of the lack of reasoned decision-making and apparent errors in the rule's scope of certification, indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled that it could not or would not adopt the same rule upon remand." Slip op. at 14-15. The effect of the court's vacatur was to reinstate the 1971 Rule, effective October 21, 2021. Defendant-intervenors appealed the vacatur order to the U.S. Court of Appeals for the Ninth Circuit. On April 6, 2022, the U.S. Supreme Court granted the defendant-intervenors' application for a stay of the vacatur pending the Ninth Circuit appeal. *Louisiana v. Am. Rivers*, No. 21A539 (S. Ct. April 6, 2022).[13] The effect of the Court's stay is that the 2020 Rule once again applies to section 401 certifications until EPA finalizes this proposed rulemaking.

The Agency is now proposing to revise the 2020 Rule to better reflect the cooperative federalism framework and text of the 1972 statutory amendments and provide needed clarity on issues such as scope of certification and the reasonable period of time for a certifying authority to

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[12] *See* EPA's Motion for Remand Without Vacatur, No. 3:20-cv-04636-WHA (July 1, 2021).

[13] The Court's stay order does not alter EPA's legal conclusions discussed in this proposed rule. The request for a stay concerned only the appropriateness of the district court's vacatur of a promulgated rule before a decision on the merits. The stay request did not raise any issues related to the substance of CWA section 401 certification or the merits of the 2020 Rule. *See* Louisiana Application for Stay Pending Appeal in *Louisiana v. Am. Rivers*, No. 21A539, pp. 1, 4, 16 (March 21, 2022) (identifying "the core issue in this case" to be the appropriateness of the district court's vacatur order) (identifying the APA—not the CWA or section 401—as the statutory provision involved in the application for stay) (starting the application for stay with the question: "Can a single district court vacate a rule that an agency adopted through notice-and-comment rulemaking without first finding that the rule is unlawful?"). Neither the Court's majority—which did not issue an opinion explaining its stay order—nor the dissent discussed any aspect of section 401 certification or the 2020 Rule.

act. The proposed rule would modify the regulatory text implementing section 401 to support a more efficient, effective, and predictable certifying authority-driven certification process consistent with the water quality protection and other policy goals of Executive Order 13990. The Agency is also proposing conforming amendments to the water quality certification regulations for EPA-issued NPDES permits.

II. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA-HQ-OW-2022-0128, at https://www.regulations.gov (our preferred method), or the other methods identified in the **ADDRESSES** section above. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at https://www.regulations.gov any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit https://www.epa.gov/dockets/commenting-epa-dockets.

B. Virtual Public Hearing

Please note that because of current Centers for Disease Control and Prevention (CDC) recommendations, as well as state and local orders for social distancing to limit the spread of COVID-19, EPA does not anticipate holding in-person public meetings at this time. EPA is hosting a virtual public hearing on Monday, July 18, 2022; the public hearing will consist of three virtual sessions, which will be recorded for transcription purposes.

EPA will begin pre-registering speakers for the hearing upon publication of this document in the ***Federal Register***. To register to speak at or attend the virtual hearing on July 18, 2022, please use the online registration form available at https://www.epa.gov/cwa-401/upcoming-outreach-and-engagement-cwa-section-401-certification. The last day to pre-register to speak at the hearing will be July 12, 2022, three working days before the hearing date. On July 15, 2022, EPA will post a general agenda for the hearing that will list pre-registered speakers in approximate order at: https://www.epa.gov/cwa-401/upcoming-outreach-and-engagement-cwa-section-401-certification.

EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing sessions to run either ahead of schedule or behind schedule. A public hearing session may end ahead of schedule if all interested speakers have had the opportunity to participate and if no other speakers come forward within 15 minutes of the last speaker.

Each commenter will have five minutes to give their name and affiliation, and provide oral testimony. EPA encourages commenters to provide the Agency with a copy of their oral testimony electronically by emailing it to *cwa401@epa.gov*. EPA also recommends submitting the text of your oral comments as written comments to the rulemaking docket.

EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at https://www.epa.gov/cwa-401/upcoming-outreach-and-engagement-cwa-section-401-certification. While EPA expects the hearing to go forward as set forth above, please monitor our website or contact *cwa401@epa.gov* to determine if there are any updates. EPA does not intend to publish a document in the ***Federal Register*** announcing updates.

If you require the services of a translator or special accommodations such as audio description, please pre-register for the hearing with *cwa401@epa.gov* and describe your needs by July 5, 2022. EPA may not be able to arrange accommodations without advanced notice.

III. General Information

A. What action is the agency taking?

In this action, the Agency is publishing a proposed rule to replace its currently effective water quality certification regulations at 40 CFR part 121.

B. What is the agency's authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including but not limited to sections 101(d), 304(h), 401, 402, and 501(a).

C. What are the incremental costs and benefits of this action?

The Agency prepared the Economic Analysis for the Proposed "Clean Water Act Section 401 Water Quality Certification Improvement Rule" ("Economic Analysis for the Proposed Rule"), available in the rulemaking docket, for informational purposes to analyze the potential costs and benefits associated with this proposed action. The analysis is summarized in section VI in this preamble. The Economic Analysis for the Proposed Rule is qualitative because of significant limitations and uncertainties associated with estimating the incremental costs and benefits of the proposed rule; see section VI of this preamble for further discussion.

IV. Background

A. Development of Section 401

In 1965, Congress amended the Federal Water Pollution Control Act (FWPCA) to require states, or, where a state failed to act, the newly created Federal Water Pollution Control Administration, to promulgate water quality standards for interstate waters within each state. Water Quality Act of 1965, Public Law 89-234, 79 Stat. 903 (October 2, 1965). These standards were meant "to protect the public health or welfare, enhance the quality of water and serve the purposes of [the] Act," which included "enhanc[ing] the quality and value of our water resources

and [] establish[ing] a national policy for the prevention, control, and abatement of water pollution." *Id*. Yet, only a few years later, while debating potential amendments to the FWPCA, Congress discovered that, despite that laudable national policy, states faced obstacles to achieving these newly developed water quality standards because of an unexpected source: Federal agencies. Instead of helping states cooperatively achieve these Federal policy objectives, Federal agencies were "sometimes . . . a culprit with considerable responsibility for the pollution problem which is present." 115 Cong. Rec. 9011, 9030 (April 15, 1969). Federal agencies were issuing licenses and permits "without any assurance that [water quality] standards [would] be met or even considered." S. Rep. No. 91-351, at 3 (August 7, 1969). As a result, states, industry groups, conservation groups, and the public alike "questioned the justification for requiring compliance with water quality standards" if Federal agencies themselves would not comply with those standards. *Id*. at 7.

In response to such concerns, Congress introduced language that would bolster state authority to protect their waters and ensure federally licensed or permitted projects would not "in fact become a source of pollution" either through "inadequate planning or otherwise." 115 Cong. Rec. 9011, 9030 (April 15, 1969). Under this new provision, instead of relying on the Federal Government to ensure compliance with water quality standards, states would be granted the power to certify that there was reasonable assurance that federally licensed or permitted activities would meet water quality standards before such a license or permit could be issued. Ultimately, Congress added this new provision as section 21(b) of the Water Quality Improvement Act of 1970, Pub. L. 91-224, 84 Stat. 91 (April 3, 1970).

Under section 21(b)(1), applicants for Federal licenses or permits were required to obtain state certification that there was reasonable assurance that any federally licensed or permitted activity that may result in any discharge into navigable waters would not violate applicable water quality standards. *Id.* Additionally, section 21(b) also provided a role for other potentially affected states, discussed scenarios under which state certification for both Federal construction

and operation licenses or permits may be necessary, and provided an opportunity for a Federal license or permit to be suspended for violating applicable water quality standards. Section 21(b) embodied the cooperative federalism principles from the 1965 amendments by providing states with the opportunity to influence, yet not "frustrate," the Federal licensing or permitting process. *See* 115 Cong. Rec. 28875, 28971 (October 7, 1969) (noting the idea of state certification "[arose] out of policy of the 1965 Act that the primary responsibility for controlling water pollution rests with the States"); *see also* H.R. Rep. No. 91-940, at 54-55 (March 24, 1970) (Conf. Rep) (adding a timeline for state certification "[i]n order to insure that sheer inactivity by the State . . . will not frustrate the Federal application").

In 1972, Congress significantly revised the statutory water quality protection framework.[14] Clean Water Act, Public Law 92–500, 86 Stat. 816, as amended, Public Law 95–217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq*. While doing so, Congress reaffirmed "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution."[15] To this end, the 1972 amendments included section 401, which Congress considered to be "substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act." H.R. Rep. No. 92-911 at 121 (1972). These "new requirements" of the 1972 Act reflected a "changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants." S. Rep. No. 92-414 at 69 (1971). As a result, unlike section 21(b) which focused only on compliance with water quality standards, section 401 required applicants for Federal licenses and permits to obtain state certification of compliance with the newly developed provisions focused on achieving effluent limitations. 33 U.S.C. 1341(a)(1). A few years later, Congress amended section 401 to correct an omission from the 1972 statute and clarify that it still intended for states

[14] *City of Milwaukee v. Illinois*, 451 U.S. 304, 310, 317 (1981).
[15] 33 U.S.C. 1251(b).

to also certify compliance with water quality standards. *See* H.R. Rep. No. 95-830, at 96 (1977) (inserting section 303 in the list of applicable provisions throughout section 401).[16]

Section 401 of the 1972 Act also introduced a new subsection, subsection (d), that explicitly provided states with the ability to include "effluent limitations and other limitations, and monitoring requirements" in their certification to assure that the applicant will comply not only with sections 301, 302, 306, and 307, but also with "any other appropriate requirement of State law." *Id*. at 1341(d). In subsection (d), Congress also provided that any certification "shall become a condition on any Federal license or permit." *Id.*; *see also* S. Rep. No. 92-414, at 69 (1971) ("The certification provided by a State in connection with any Federal license or permit must set forth effluent limitations and monitoring requirements necessary to comply with the provisions of this Act or under State law and such a certification becomes an enforceable condition on the Federal license or permit."). Consistent with Congress's intent to empower states to protect their waters from the effects of federally licensed or permitted projects, this provision "assure[d] that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414, at 69 (1971).

B. Overview of CWA Section 401 Requirements

Under CWA section 401, a Federal agency may not issue a license or permit to conduct any activity that may result in any discharge into a water of the United States, unless the certifying authority where the discharge would originate either issues a CWA section 401 water quality certification or waives certification. 33 U.S.C. 1341(a)(1). The applicant for the Federal

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[16] The conference substitute noted that "[t]he inserting of section 303 into the series of sections listed in section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303. The inclusion of section 303 is intended to clarify the requirements of section 401. It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in the other sections of the Act where sections 301, 302, 306, and 307 are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act, such as sections 301, 309, 402, and 509 and any other point where they are listed. Section 303 is always included by reference where section 301 is listed." *Id*.

license or permit that requires section 401 certification is responsible for obtaining certification or a waiver from the certifying authority, which could be a state, territory, authorized tribe, or EPA, depending on where the discharge originates. To initiate the certification process, Federal license or permit applicants must submit a "request for certification" to the appropriate certifying authority. The certifying authority must act upon the request within a "reasonable period of time (which shall not exceed one year)." *Id*. Additionally, during the reasonable period of time, certifying authorities must provide public notice of a certification request, and where appropriate, hold a public hearing. *Id*.

If a certifying authority determines that a discharge will comply with the listed provisions in section 401(a)(1), it may grant or waive certification. When granting a CWA section 401 certification, certifying authorities must include conditions (*e.g.*, "effluent limitations and other limitations, and monitoring requirements") pursuant to CWA section 401(d) necessary to assure that the applicant for a Federal license or permit will comply with applicable provisions of CWA sections 301, 302, 306, and 307, and with "any other appropriate requirement of State law." *Id*. at 1341(d). If a certifying authority grants certification with conditions, that certification shall become a condition on the Federal license or permit. *Id*. Once an applicant provides a Federal agency with a certification, the Federal agency may issue the license or permit. *Id*. at 1341(a)(1).

If a certifying authority is unable to provide such certification, the certifying authority may deny or waive certification. If certification is denied, the Federal agency cannot issue the Federal license or permit. If certification is waived, the Federal agency may issue the Federal license or permit. Certifying authorities may waive certification expressly, or they may waive certification by "fail[ing] or refus[ing] to act on a request for certification within a reasonable period of time." Either way, the Federal licensing or permitting agency may issue the Federal license or permit. *Id*.

Although Congress provided section 401 certification authority to the jurisdiction in which the discharge originates, Congress also recognized that another state's or authorized

tribe's water quality may be affected by the discharge, and it created an opportunity for such a state or tribe to raise objections to, and request a hearing on, the Federal license or permit. *See id*. at 1341(a)(2). Section 401(a)(2) requires the Federal agency to "immediately notify" EPA "upon receipt" of a "[license or permit] application and certification." *Id*. EPA in turn has 30 days from that notification to determine whether the discharge "may affect" the water quality of any other state or authorized tribe. *Id*. If the Agency makes a "may affect" determination, it must notify the other state or authorized tribe, the Federal agency, and the applicant. The other state or authorized tribe then has 60 days to determine whether the discharge will violate its water quality requirements. If the other state or authorized tribe makes such a determination within those 60 days, it must notify EPA and the Federal agency, in writing, of its objection(s) to the issuance of the Federal license or permit and request a public hearing. *Id*. The Federal licensing or permitting agency is responsible for holding the public hearing. At the hearing, EPA is required to submit its evaluation and recommendations regarding the objection. Based on the recommendations from the objecting state or authorized tribe and EPA's own evaluation and recommendation, as well as any evidence presented at the hearing, the Federal agency is required to condition the license or permit "in such manner as may be necessary to insure compliance with applicable water quality requirements." *Id*. The license or permit may not be issued "if the imposition of conditions cannot ensure such compliance." *Id*.

Section 401 also addresses when an applicant must provide separate certifications for a facility's Federal construction license or permit and any necessary Federal operating license or permit. Under section 401(a)(3), an applicant may rely on the same certification obtained for the construction of a facility for any Federal operating license or permit for the facility if 1) the Federal agency issuing the operating license or permit notifies the certifying authority, and 2) the certifying authority does not within 60 days thereafter notify the Federal agency that "there is no longer reasonable assurance that there will be compliance with applicable provisions of sections

[301, 302, 303, 306 and 307 of the CWA]." *Id.*[17]

Sections 401(a)(4) and (a)(5) discuss circumstances where the certified Federal license or permit may be suspended by the Federal agency. First, a Federal agency may suspend a license or permit where a certifying authority determines during a pre-operation inspection of the facility or activity that it will violate applicable water quality requirements. *Id*. at 1341(a)(4). This pre-operation inspection and possible suspension apply only where a facility or activity does not require a separate operating license or permit. Under section 401, the Federal agency may not suspend the license or permit unless it holds a public hearing.[18] *Id*. Once a license or permit is suspended, it must remain suspended until the certifying authority notifies the Federal agency that there is reasonable assurance that the facility or activity will not violate applicable water quality requirements. *Id*. Second, a Federal agency may suspend or revoke a certified license or permit if a judgment is entered under the CWA that the facility or activity violated applicable provisions of sections 301, 302, 303, 306, or 307 of the CWA. *Id*. at 1341(a)(5).

Section 401 not only identifies the roles and obligations of Federal license or permit applicants, certifying authorities, and Federal agencies, it also provides specific roles for EPA. First, EPA may act as a certifying authority where a state or tribe "has no authority to give such certification." *Id*. at 1341(a)(1). Second, as discussed above, EPA is responsible for notifying other states or authorized tribes that may be affected by a discharge from a federally licensed or permitted activity, and where required, for providing an evaluation and recommendation(s) on such other state or authorized tribe's objections. *Id*. at 1341(a)(2). Lastly, EPA is responsible for providing technical assistance upon request from Federal agencies, certifying authorities, or Federal license or permit applicants. *Id*. at 1341(b).

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[17] Section 401(a)(3) identifies the bases a certifying authority may rely upon for finding that there is no longer reasonable assurance. These are changes after certification was granted in: construction or operation of the facility, characteristics of the water where the discharge occurs, or the applicable water quality criteria or effluent limits or other requirements. *Id*. at 1341(a)(3).

[18] Each Federal licensing or permitting agency may have its own regulations regarding additional processes for suspending a license or permit.

C. Prior Rulemaking Efforts Addressing Section 401

In the last 50 years, EPA has undertaken two rulemaking efforts focused solely on addressing water quality certification, one of which preceded the 1972 enactment of the CWA. The Agency has also developed several guidance documents on the section 401 process. This section of the preamble discusses EPA's major rulemaking and guidance efforts over the last 50 years, including most recently, the 2020 Rule and EPA's review of it pursuant to Executive Order 13990.

1. 1971 Rule

In February 1971, EPA proposed regulations implementing section 401's predecessor provision, section 21(b). 36 FR 2516 (February 5, 1971). Those proposed regulations were divided into four subparts, one of which provided "definitions of general applicability for the regulations and would provide for the uniform content and form of certification." The other three subparts focused on EPA's roles. *Id*. In May 1971, after receiving public comments, EPA finalized the water quality certification regulations with the proposed four-part structure at 18 CFR part 615. 36 FR 8563 (May 8, 1971).

The first subpart of the 1971 Rule (subpart A) established requirements that applied generally to all stakeholders in the certification process, including an identification of information that all certifying authorities must include in a certification. According to the 1971 Rule, a certifying authority was required to include several components in a certification, including the name and address of the project applicant; a statement that the certifying authority either examined the Federal license or permit application or examined other information from the project applicant and, based upon that evaluation, concluded that "there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;" any conditions that the certifying authority deemed "necessary or desirable for the discharge of the activity;" and any other information the certifying authority deemed appropriate. 40 CFR 121.2(a) (2019). Additionally, the 1971 Rule allowed for modifications to certifications

upon agreement by the certifying authority, the Federal licensing or permitting agency, and EPA. *Id*. at § 121.2(b) (2019).

The second subpart of the 1971 Rule (subpart B) established a process for EPA to provide notification of potential water quality affects to other potentially affected jurisdictions. Under the 1971 Rule, the Regional Administrator was required to review the Federal license or permit application, the certification or waiver, and, where requested by EPA, any supplemental information provided by the Federal licensing or permitting agency.[19] If the Regional Administrator determined that there was "reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates," the Regional Administrator would notify each affected state within 30 days of receipt of the application materials and certification. *Id*. at §§ 121.13, 121.16 (2019). In cases where the Federal licensing or permitting agency held a public hearing on the objection raised by an affected jurisdiction, the Federal agency was required to forward notice of such objection to the Regional Administrator no later than 30 days prior to the hearing. *Id*. at § 121.15 (2019). At the hearing, the Regional Administrator was required to submit an evaluation and "recommendations as to whether and under what conditions the license or permit should be issued." *Id*.

Subpart B also provided that certifying authorities may waive the certification requirement under two circumstances: first, when the certifying authority sends written notification expressly waiving its authority to act on a request for certification; and second, when the Federal licensing or permitting agency sends written notification to the EPA Regional Administrator that the certifying authority failed to act on a certification request within a reasonable period of time after receipt of such a request. *Id*. at § 121.16 (2019). The 1971 Rule provided that the Federal licensing or permitting agency determined what constitutes a

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[19] If the documents provided are insufficient to make the determination, the Regional Administrator can request any supplemental information "as may be required to make the determination." 40 CFR 121.12.

"reasonable period of time," and that the period shall generally be six months, but in any event, not exceed one year. *Id*. at § 121.16(b) (2019).

The third subpart of the 1971 Rule (subpart C) established requirements that only applied when EPA acted as the certifying authority, including identifying specific information that must be included in a certification request. The project applicant was required to submit to the EPA Regional Administrator a signed request for certification that included a "complete description of the discharge involved in the activity for which certification is sought," which included five items: the name and address of the project applicant, a description of the facility or activity and of any related discharge into waters of the United States, a description of the function and operation of wastewater treatment equipment, dates on which the activity and associated discharge would begin and end, and a description of the methods to be used to monitor the quality and characteristics of the discharge. *Id*. at § 121.22 (2019). Once the request was submitted to EPA, the Regional Administrator was required to provide public notice of the request and an opportunity to comment. The 1971 Rule specifically stated that "[a]ll interested and affected parties will be given reasonable opportunity to present evidence and testimony at a public hearing on the question whether to grant or deny certification if the Regional Administrator determined that such a hearing is necessary or appropriate." *Id*. at § 121.23 (2019). If, after consideration of relevant information, the Regional Administrator determines that there is "reasonable assurance that the proposed activity will not result in a violation of applicable water quality standards," the Regional Administrator would issue the certification. *Id*. at § 121.24 (2019).

The fourth and final subpart of the 1971 Rule (subpart D) provided that the Regional Administrator "may, and upon request shall" provide Federal licensing and permitting agencies with information regarding water quality standards and advise them as to the status of compliance by dischargers with the conditions and requirements of applicable water quality standards. *Id*. at § 121.30 (2019).

In November 1971, EPA reorganized and transferred several regulations, including the water quality certification regulations, into title 40 of the Code of Federal Regulations. EPA subsequently redesignated the water quality certification regulations twice in the 1970s. *See* 36 FR 22369, 22487 (November 25, 1971), redesignated at 37 FR 21441 (October 11, 1972), further redesignated at 44 FR 32854, 32899 (June 7, 1979). The last redesignation effort was part of a rulemaking that extensively revised the Agency's NPDES regulations. In the revised NPDES regulations, EPA addressed water quality certifications on EPA-issued NPDES permits separate from the 1971 Rule. EPA acknowledged that the 1971 Rule was "in need of revision" because the "substance of these regulations predates the 1972 amendments to the Clean Water Act." 44 FR 32880. However, EPA declined to revise the 1971 Rule because it had not consulted the other Federal agencies impacted by the water quality certification process. *Id*. at 32856. Instead, the Agency finalized regulations applicable to certification on EPA-issued NPDES permits. *Id*. at 32880. These regulations, which included a default reasonable period of time of 60 days, limitations on certification modifications, and requirements for certification conditions, were developed in response to practical challenges and issues arising from certification on EPA-issued permits. *Id*. Ultimately, despite the changes Congress made to the statutory text in 1972 and opportunities it had to revisit the regulatory text during redesignation efforts in the 1970s, EPA did not substantively change the 1971 Rule until 2020.

2. EPA Guidance on 1971 Rule

Although EPA did not pursue any rulemaking efforts until 2019, the Agency issued three national guidance documents on the water quality certification process set forth by the 1971 Rule. The first and second guidance documents recognized the vital role section 401 certification can play in protecting state and tribal water quality, sought to inform states and tribes how to use the certification program to protect their waters, and explained how to leverage available resources to operate or expand their certification programs. These documents provided states and tribes with background on the certification process, discussed the relevant case law, and

identified data sources that could inform the certification review process. Additionally, both documents provided tangible examples of state and tribal experiences with section 401 that could inform other states and tribes interested in developing their certification programs.

The first guidance document, issued in 1989, focused on how states and tribes could use water quality certifications to protect wetlands. Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (April 1989) ("1989 Guidance"). While the guidance document focused on the use of water quality certifications in lieu of, or in addition to, state or tribal wetlands regulatory programs, it provided helpful background information on the certification process. It also highlighted various state programs and water quality certification practices to demonstrate how other certifying authorities could approach the certification process. For example, the guidance document highlighted a certification denial issued by the Pennsylvania Department of Environmental Resources to illustrate that "all of the potential effects of a proposed activity on water quality – direct and indirect, short and long term, upstream and downstream, construction and operation – should be part of a State's certification review." *Id*. at 22-23. Additionally, the 1989 Guidance discussed considerations states or tribes could examine when developing their own section 401 implementing regulations, as well as programs and resources states and tribes could look to for technical support when making certification decisions. *Id*. at 30-37.

The second guidance document, issued in 2010, reflected the development of case law and state and tribal program experiences over the two decades following the 1989 Guidance. Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes (May 2010) ("2010 Handbook") (rescinded). Instead of focusing on certifications in the context of wetland protection, the 2010 Guidance focused more broadly on how the certification process could help states and tribes achieve their water quality goals. Like the 1989 Guidance, the 2010 Guidance discussed the certification process, using state and tribal programs as examples, and explored methods and means for states and tribes to leverage

available funding, staffing, and data sources to fully implement a water quality certification program. This guidance document was rescinded on June 7, 2019, concurrent with the publication of the third guidance document.

The third guidance document was issued in 2019 pursuant to Executive Order 13868 (now revoked). Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 2019) ("2019 Guidance") (rescinded). The 2019 guidance document said it was meant to "facilitate consistent implementation of section 401 and 1971 certification regulations" because the 2010 Handbook allegedly did not "reflect current case law interpreting CWA section 401." 85 FR 42213. The guidance document focused on three topics: timeline for certification review and action, the scope of section 401, and the information within the scope of a certifying authority's review. 2019 Guidance, at 1. The 2019 Guidance was rescinded on July 13, 2020, concurrent with the publication of the final 2020 Rule.

3. Development of the 2020 Rule

In addition to directing EPA to review its 2010 Handbook and issue new section 401 guidance, Executive Order 13868 also directed EPA to review the 1971 Rule and (1) issue a new proposed regulation within 120 days and (2) issue a final regulation within 13 months. 84 FR 13495, 13496 (April 15, 2019). It directed the Agency to focus on various aspects of the certification process such as the scope of review, and determine whether "any provisions thereof should be clarified to be consistent with the policies described in section 2 of [the] order." *Id*. EPA released the proposed rule on August 22, 2019.[20] EPA promulgated a final rule on July 13, 2020. Clean Water Act Section 401 Certification Rule, 85 FR 42210 (July 13, 2020) ("2020 Rule").

The 2020 Rule reaffirmed that Federal agencies unilaterally set the reasonable period of time, clarified that the certification requirement was triggered by a federally licensed or permitted discharge into a "water of the United States," and reaffirmed that certifying authorities

[20] Updating Regulations on Water Quality Certifications, 84 FR 44080 (August 22, 2019).

may explicitly waive certification. The 2020 Rule also introduced several new features including one that allowed Federal agencies to review certification decisions for compliance with the 2020 Rule's requirements and, if the certification decision did not comply with these requirements, allowed Federal agencies to deem such non-compliant certifications as waived. The 2020 Rule, citing *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), prohibited a certifying authority from requesting a project applicant to withdraw and resubmit a certification request. The 2020 Rule also rejected the scope of certification review ("activity as a whole") affirmed by the Supreme Court in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), in favor of a more truncated interpretation ("discharge-only" approach) favored by two dissenting Justices in that case.

Following publication, the 2020 Rule was subject to legal challenge in three Federal district courts by states, tribes, and non-governmental organizations.[21] On October 21, 2021, following extensive briefing and a hearing on EPA's motion for remand without vacatur, the U.S. District Court for the Northern District of California remanded and vacated[22] the 2020 Rule. *In re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA, 2021 WL 4924844 (N.D. Cal. October 21, 2021). The court found that vacatur was appropriate "in light of the lack of reasoned decision-making and apparent errors in the rule's scope of certification, indications that the rule contravenes the structure and purpose of the Clean Water Act, and that EPA itself has signaled that it could not or would not adopt the same rule upon remand." Slip op. at 14-15, 2021 WL 4924844, at *8. The court order required a temporary return to EPA's 1971 Rule until EPA finalizes a new rule.[23] This case is currently on appeal by industry stakeholders and eight states

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[21] *In Re Clean Water Act Rulemaking*, No. 3:20-cv-04636-WHA (N.D. Cal.); *Delaware Riverkeeper et al. v. EPA*, No. 2:20-cv-03412 (E.D.P.A.); *S.C. Coastal Conservation League v. EPA*, No. 2:20-cv-03062 (D.S.C.).

[22] To remand a rule means that the court returns the rule to the Agency for further action. To vacate a rule means that the court decides that rule is null and void.

[23] The two other courts also remanded the 2020 Rule to EPA, but without vacatur. Order, *Delaware Riverkeeper v. EPA*, No. 2:20-cv-03412 (E.D. Pa. August 6, 2021) (determining that vacatur was not appropriate because the court "has not yet, and will not, make a finding on the

in the U.S. Court of Appeals for the Ninth Circuit. On March 21, 2022, industry stakeholders and eight states filed an application for a stay of the vacatur pending appeal in the Ninth Circuit. On April 6, 2022, the U.S. Supreme Court granted the application for a stay of the vacatur pending resolution of the appeal of the vacatur in the Ninth Circuit. *Louisiana v. Am. Rivers*, No. 21A539 (S. Ct. April 6, 2022).

4. Executive Order 13990 and Review of the 2020 Rule

On January 20, 2021, President Biden signed Executive Order 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (E.O.). 86 FR 7037 (published January 25, 2021, signed January 20, 2021). The E.O. provides that it's the policy of the Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals. *Id*. at 7037, Section 1. The E.O. "directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis." *Id*. "For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." *Id*., Section 2(a). The E.O. also revoked Executive Order 13868 of April 10, 2019 (Promoting Energy Infrastructure and Economic Growth), which initiated development of the 2020 Rule. The 2020

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substantive validity of the Certification Rule"); Order, *S.C. Coastal Conservation League v. EPA*, No. 2:20-cv-03062 (D.S.C. August 2, 2021) (remanding without vacating).

Rule also was specifically identified for review under the E.O. *See* Fact Sheet: List of Agency Actions for Review, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ (last visited on January 27, 2022).

EPA reviewed the 2020 Rule in accordance with Executive Order 13990, and in the spring of 2021, determined that it would propose revisions to the 2020 Rule through a new rulemaking effort. *See* Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule, 86 FR 29541 (June 2, 2021). EPA considered a number of factors in making this determination, including but not limited to: the text of CWA section 401; Congressional intent and the cooperative federalism framework of CWA section 401; concerns raised by stakeholders about the 2020 Rule, including implementation related feedback; the principles outlined in the E.O. and issues raised in ongoing litigation challenging the 2020 Rule. *Id*. In particular, the Agency identified substantial concerns about whether portions of the 2020 Rule impinged on the cooperative federalism principles central to CWA section 401. The Agency identified this and other concerns as they related to different provisions of the 2020 Rule including certification requests, the reasonable period of time, scope of certification, certification actions and Federal agency review, enforcement, and modifications. *See id*. at 29543-44.

Agencies have inherent authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (''*Fox*''); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."). Such a decision need not be based upon a change of facts or circumstances. A revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C.

Cir. 2012) (*citing Fox*, 556 U.S. at 514–15). The Agency has reviewed the 2020 Rule and determined that the rule should be replaced.

Accordingly, EPA is now proposing to revise the 2020 Rule to be fully consistent with the 1972 CWA amendments, the Agency's legal authority, and the principles outlined in Executive Order 13990. This proposed rule would revise and replace the 2020 Rule to better reflect the 1972 CWA's statutory text, the legislative history regarding section 401, and the broad water quality protection goals of the Act. In addition, the proposed rule will clarify certain aspects of section 401 implementation that have evolved in response to over 50 years of judicial interpretation and certifying authority practice, and support an efficient and predictable water quality certification process that is consistent with the cooperative federalism principles central to CWA section 401.

D. Summary of Stakeholder Outreach

Following the publication of EPA's notice of intent to revise the 2020 Rule, the Agency opened a public docket to receive written pre-proposal recommendations for a 60-day period beginning on June 2, 2021, and concluding on August 2, 2021. The Agency received nearly 3,000 recommendations from members of the public, which can be found in the pre-proposal docket. *See* Docket ID No. EPA-HQ-OW-2021-0302. The *Federal Register* publication requested feedback related to key issues identified during implementation of the 2020 Rule, including but not limited to issues regarding pre-filing meeting requests, certification requests, reasonable period of time, scope of certification, certification actions and Federal agency review, enforcement, modifications, neighboring jurisdictions, data and other information, and implementation coordination. *See* 86 FR 29543-44.

EPA also held a series of virtual listening sessions for certifying authorities (June 14, June 23, and June 24, 2021), project applicants (June 15, 2021), and the public (June 15, June 23, 2021) to gain further pre-proposal input. *See id*. at 29544 (announcing EPA's intention to hold multiple webinar-based listening sessions). EPA also met with stakeholders upon request during

development of this proposed rule. More information about the outreach and engagement conducted by EPA during the pre-proposal input period can be found in Docket ID No. EPA-HQ-OW-2022-0128. Additionally, EPA also met with other Federal licensing and permitting agencies to solicit feedback on the *Federal Register* publication. At the virtual listening sessions, the Agency provided a presentation that provided background on section 401 and prior Agency actions and sought input on the Agency's intent to revise the 2020 Rule and the specific issues included in the *Federal Register* publication described above.

The Agency heard from stakeholders representing a diverse range of interests and positions and received a wide variety of recommendations and suggestions during this pre-proposal outreach process. Certifying authorities expressed concern about the limited role of states and tribes under the 2020 Rule, and they called for increased flexibility in implementing section 401 to fully protect their water resources. During the project proponent listening session, project proponents shared feedback about the need to streamline the certification process and recommended that the new rule prevent delays in determining certification decisions. In the general public listening sessions, speakers from non-governmental environmental and water conservation organizations reinforced the idea that states and tribes should be accorded greater deference in the certification process. An overarching theme articulated by many speakers from various stakeholder groups was the need for EPA's new rule to provide increased guidance and clarity.

The Agency also initiated a tribal consultation and coordination process on June 7, 2021. The Agency engaged tribes over a 90-day consultation period during development of this proposed rule that concluded on September 7, 2021, including two tribal consultation kickoff webinars on June 29, 2021, and July 7, 2021. The Agency received consultation letters from eight tribes and three tribal organizations. The Agency did not receive any requests for consultation during this time, although several tribes expressed an interest in receiving additional information and ongoing engagement throughout the rulemaking process. The Agency

anticipates that consultation meetings will be held with tribes during the rulemaking process. Several tribes commented that the 2020 Rule impaired or undermined tribal sovereignty and their ability to protect tribal waters. Many tribes provided input regarding section 401 certification process improvements. Most tribes were generally positive about a provision for a pre-filing meeting request, however some had concerns that the 30-day wait period (before a project proponent could request certification) is very rigid and would like to see more flexibility in allowing certifying authorities to waive the 30-day requirement. Some tribes believe "the reasonable period of time" should start when the application is deemed complete, not when the initial request for certification is received. Most tribes argued that the 2020 Rule's narrowing of the scope of certification was inconsistent with Congressional intent for tribes and states to have an effective tool to protect the quality of waters under their jurisdiction. A few tribal organizations expressed concern that current implementation of section 401(a)(2) does not protect off-reservation treaty rights from discharges. Additional information about the tribal consultation process can be found in section VII.F in this preamble and the Summary of Tribal Consultation and Coordination, which is available in the docket for this proposed rule.

The Agency has considered the input it received as part of the tribal consultation process and other opportunities for pre-proposal recommendations. EPA welcomes feedback on this proposed rule through the upcoming virtual public hearing and the 60-day public comment period initiated through publication of this action. The Agency will consider comments received during the comment period on this proposal, and this consideration will be reflected in the final rule and supporting documents.

V. Proposed Rule

EPA is the primary agency responsible for developing regulations and guidance to ensure effective implementation of all CWA programs, including section 401. *See* 33 U.S.C. 1251(d), 1361(a). The Agency is proposing to revise the section 401 regulations to better align its regulations with the cooperative federalism and water quality protection principles enshrined in

the text and legislative history of the 1972 CWA. Additionally, the Agency is seeking to provide greater clarity and acknowledgment of essential water quality protection concepts from Executive Order 13990. In addition to providing a necessary regulatory reset on significant issues such as the scope of certification, Federal agency review, and the reasonable period of time, the Agency proposes to update the regulatory text to foster a more efficient and predictable certification process. As it has already demonstrated through its extensive pre-proposal outreach, EPA intends for this rulemaking to be well-informed by stakeholder input on all aspects of the certification process and welcomes comment on all facets of this proposal.

In light of the proposed revisions to part 121, EPA is also proposing to make conforming changes to the part 124 regulations governing CWA section 401 certifications for EPA-issued NPDES permits. The purpose of these conforming changes is to ensure that—assuming the proposed part 121 changes are adopted—the part 124 regulations are consistent with the revised provisions of part 121. To that end, EPA is proposing to make targeted deletions to specific provisions of the regulations at 40 CFR 124.53 and 124.55 to conform those sections with this proposal, explicitly deleting 40 CFR 124.53(b), (c), and (e), as well as § 124.55(b). EPA is also proposing to make targeted revisions to the regulations at 40 CFR 124.53(d), 124.54(a) and (b), 124.55(a), (c), and (d), consistent with those proposed deletions and this proposal. EPA is also proposing to make targeted conforming revisions to the regulations at 40 CFR 122.4(b) and 122.44(d)(3). EPA explains in further detail the reasons for each conforming change (beyond mere technical revisions) following the preamble discussion of the part 121 proposal that necessitates conforming revisions to part 124. EPA is seeking comment on whether the Agency has identified all changes to the part 124 regulations that conflict or potentially conflict with this proposal and therefore need to be made to conform. This proposed part 121 regulations would apply to all Federal licenses or permits subject to CWA section 401 certification.[24] EPA

[24] *See* proposed § 121.1(e), (h) (defining "Federal agency" to mean "any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water

accordingly intends for this part 121 proposal to apply to EPA-issued NPDES permits, even where EPA is not proposing conforming edits to part 124.

EPA is also proposing to make several revisions to the definition section in light of this proposed rulemaking. EPA is proposing to make minor revisions to the definition of "Administrator", currently located at § 121.1(a), to remove the reference to authorized representatives. Instead, the Agency is proposing to add a separate definition for "Regional Administrator". *See* proposed § 121.1(k). The Agency is also proposing to remove the definition for "certification", which is currently located at § 121.1(b), because it does not believe it is necessary to define the term. Additionally, the Agency is proposing to remove the definition for "certified project", currently located at § 121.1(d), and "proposed project", currently located at § 121.1(k), because the Agency is not proposing to use these terms throughout other regulatory provisions. Other proposed revisions to regulatory definitions are discussed throughout this preamble; the Agency welcomes any comments on these definitions.

A. When Section 401 Certification is Required

In this proposed rulemaking, EPA is proposing a number of definitional and other revisions to clarify the circumstances under which a section 401 certification is required. These proposed revisions are consistent with the Agency's longstanding interpretation of section 401, including in the 2020 Rule, that an applicant for a Federal license or permit to conduct any activity that may result in any point source discharge into the navigable waters is required to obtain a section 401 certification. Accordingly, the Agency is proposing minor revisions to the regulatory text currently located at § 121.2 to affirm that a Federal license or permit for any potential point source discharge into a water of the United States requires a certification or waiver.

Act section 401," and similarly defining "license or permit" to mean "any license or permit issued or granted by an agency of the Federal Government to conduct any activity which may result in any discharge into waters of the United States").

With respect to the definition section, EPA is proposing to clarify the roles of the stakeholders in the certification process. First, the Agency is proposing non-substantive modifications to the definition of "Federal agency" currently located at § 121.1(g). Second, the Agency is proposing to retain the term "project proponent" to define the stakeholder seeking certification. While the term "applicant" is used in section 401, that term does not clearly reflect and include all the stakeholders who might seek certification. For example, Federal agencies themselves (and not third-party applicants) seek section 401 certification on the issuance of general permits (*e.g.*, U.S. Army Corps of Engineers' (Corps') Nationwide Permits, EPA's Construction General Permits). Additionally, contractors or other agents will often seek certification on behalf of a project applicant. The term "project proponent" is meant to include the applicant for a Federal license or permit, as well as any other entity that may seek certification (*e.g.*, agent of an applicant or a Federal agency, such as EPA when it is the permitting authority for a National Pollutant Discharge Elimination System (NPDES) permit). Lastly, the Agency is proposing non-substantive changes to the definition of "certifying authority" currently located at § 121.1(e).

EPA is requesting comment on these definitions and the proposed language to clarify the circumstances under which section 401 certification is required. EPA's rationale for determining when certification is required is discussed in further detail below.

1. Federally licensed or permitted activity

Section 401 certification is required for any Federal license or permit to conduct any activity that may result in any discharge into a "water of the United States." 33 U.S.C. 1341(a)(1). The Agency is proposing to retain the 2020 Rule's definition for a "license or permit" with minor modifications.

The Agency is not proposing to provide an exclusive list of Federal licenses and permits that may be subject to section 401. The CWA itself does not list specific Federal licenses and permits that are subject to section 401 certification requirements. The most common examples of

licenses or permits that may be subject to section 401 certification are CWA section 402 NPDES permits issued by EPA in jurisdictions where the EPA administers the NPDES permitting program; CWA section 404 permits for the discharge of dredged or fill material and Rivers and Harbors Act sections 9 and 10 permits issued by the Army Corps of Engineers; and hydropower and interstate natural gas pipeline licenses issued by the Federal Energy Regulatory Commission (FERC).[25]

Section 401 certification is not required for licenses or permits issued by a state or tribe that has been authorized to administer a permit program. For example, states and tribes may be authorized to administer the section 402 NPDES permitting program[26] or the section 404 dredge and fill permitting program.[27] Permits issued by states or tribes pursuant to their approved program are not subject to section 401 of the CWA as the programs operate in lieu of the Federal program, under state or tribal authorities. The state or tribal permit is not a "Federal" permit for purposes of section 401. The CWA is clear that the license or permit prompting the need for a section 401 certification must be a Federal license or permit, that is, one issued by a Federal agency. This conclusion is supported by the legislative history of CWA section 401, which noted that "since permits granted by States under section 402 are not Federal permits—but State permits—the certification procedures are not applicable." H.R. Rep. No. 92-911, at 127 (1972). Additionally, the legislative history of the CWA amendments of 1977, discussing state assumption of section 404, also noted that "[t]he conferees wish to emphasize that such a State

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[25] The Corps also requires section 401 certification for its civil works projects, even though there is no Federal license or permit associated with those projects. The Corps' current regulations require the Corps to seek section 401 certification for dredge and fill projects involving a discharge into waters of the United States, regardless of whether the Corps issues itself a permit for those activities. *See* 33 CFR 336.1(a)(1) ("The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S."); 33 CFR 335.2 ("[T]he Corps does not issue itself a CWA permit to authorize Corps discharges of dredged material or fill material into U.S. waters but does apply the 404(b)(1) guidelines and other substantive requirements of the CWA and other environmental laws."). In these instances, EPA understands that the Corps will follow the certification process as described in this proposal.

[26] 33 U.S.C. 1342(b).

[27] 33 U.S.C. 1344(g).

program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority." H.R. Rep. No. 95-830, at 104 (1977).

2. Potential for a discharge to occur

The presence of, or potential for, a discharge is a key determinant for when a water quality certification is required. 33 U.S.C. 1341(a)(1) ("A certification is required for "a Federal license or permit to conduct any activity … which *may result* in any discharge into the navigable waters…") (emphasis added).

The Agency is not proposing a specific process or procedure for project proponents, certifying authorities, and/or Federal agencies to follow in order to determine whether or not a federally licensed or permitted activity may result in a discharge and therefore require section 401 certification. After 50 years of implementing section 401, EPA's experience is that Federal agencies and certifying authorities are well-versed in the practice of determining which Federal licenses or permits may result in discharges. Ultimately, the project proponent is responsible for obtaining all necessary permits and authorizations, including a section 401 certification. If there is a potential for a project to discharge into a "water of the United States," a Federal agency cannot issue the Federal license or permit unless a section 401 certification is granted or waived by the certifying authority. EPA recommends that project proponents engage in early discussions with certifying authorities and Federal agencies to determine whether their federally licensed or permitted activity will require section 401 certification.

The Agency requests comment on whether it should propose a specific process or procedure for project proponents, certifying authorities, and/or Federal agencies to follow in order to determine whether or not a federally licensed or permitted activity may result in a discharge and therefore require section 401 certification.

3. Discharge

Consistent with the Agency's longstanding position and the 2020 Rule, EPA is proposing that a point source discharge, or potential for one, is required to trigger section 401. *See* proposed

§ 121.2. Additionally, the Agency is clarifying that, consistent with *S.D. Warren v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), discussed below, a point source discharge triggering section 401 does not require the addition of pollutants.

The CWA provides that "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. 1362(16). The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id*. at 1362(12). EPA and the Corps have long interpreted the definition of "discharge" broadly to include, but not be limited to, "discharges of pollutants."

This interpretation is consistent with the text of the statute as interpreted by the U.S. Supreme Court. In *S.D. Warren Co*, a hydropower dam operator asserted that its dams did not result in discharges that would require section 401 certification because the dams only released water that "adds nothing to the river that was not there above the dams." 547 U.S. 370, 374-75, 378 (2006). The Court stated that the term discharge is broader than "discharge of a pollutant" and "discharge of pollutants." Observing that the term "discharge" is not specifically defined in the statute, the Court applied the ordinary dictionary meaning, "flowing or issuing out." *Id*. In applying this meaning to hydroelectric dams, the Court held that releasing water through a dam constituted a discharge for purposes of section 401 and, thus, the CWA provided states with the ability to address water quality impacts from these releases through the certification process. *Id*. at 385-86. The Court explicitly rejected the argument that an "addition" was necessary for a "discharge," stating "[w]e disagree that an addition is fundamental to any discharge." *Id.* at 379 n.5.

While the Supreme Court has held that the addition of a pollutant is not necessary for a discharge to prompt the need for a CWA section 401 certification, the Ninth Circuit has held that such certification triggering discharges must be from point sources. *Or. Natural Desert Ass'n v.*

Dombeck, 172 F.3d 1092, 1093-94 (9th Cir. 1998) ("*Dombeck*").[28] In *Dombeck*, the Ninth Circuit addressed the question whether "the term 'discharge' in [section 401] includes releases from nonpoint sources as well as releases from point sources." *Id.* At issue in that case was whether a cattle-grazing permit issued by the U.S. Forest Service required a section 401 certification.

The court observed that the word "discharge" is used consistently in the Act to refer to releases from point sources, whereas the term "runoff" is used to describe pollution flowing from nonpoint sources, and Congress did not say "runoff" in section 401. *Id.* at 1097. The court also found that all of the CWA sections cross-referenced in section 401(a)(1) were related to the regulation of point sources. *Id*. Regarding the inclusion of section 303, the CWA section requiring states to adopt and EPA to approve water quality standards, the court said that section 303 did "not itself regulate nonpoint source pollution" and, therefore, "did not sweep nonpoint sources into the scope of [section 401]." *Id*.

Following the Supreme Court's decision in *S.D. Warren* that the addition of a pollutant was not needed to trigger section 401, the Ninth Circuit reaffirmed its earlier decision that section 401 was only triggered by a point source discharge. *Or. Natural Desert Ass'n v. USFS*, 550 F.3d 778 (9th Cir. 2008). The Ninth Circuit found that "[t]he issue in *S.D. Warren* was narrowly tailored to determine whether a discharge from a point source could occur absent addition of any pollutant to the water emitted from the dam turbines." *Id.*at 783-84; *see S.D. Warren*, 547 U.S. at 376-87.[29] The Ninth Circuit held that "[n]either the ruling nor the reasoning in *S.D. Warren* is inconsistent with this court's treatment of nonpoint sources in [section] 401 of

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[28] In *Dombeck*, the United States took the position that the term "discharge" at 33 U.S.C. 1362(14) did not include nonpoint sources because there was nothing in the definition or the legislative history of the term that suggested it extended to nonpoint source pollution. Brief of the United States in *Or. Natural Desert Ass'n v. Dombeck*, Nos. 97-3506, 97-35112, 97-35115, at 18-21 (9th Cir. 1997). Additionally, the United States argued that section 401's legislative history did not suggest that "discharge" included nonpoint sources. *Id*. at 23-24.

[29] The United States made a similar observation in its brief in *USFS*. *See* Brief of the United States in *ONDA v. USFS*, No. 08–35205, at 22 (9th Cir. 2008).

the Act, as explained in *Dombeck*. Accordingly, the principles of *stare decisis* apply, and this court need not revisit the issue decided in *Dombeck*." *USFS*, 550 F.3d at 785. EPA has consistently implemented the Ninth Circuit's interpretation of section 401 as requiring the potential for a point source discharge (with or without the addition of pollutants) to trigger section 401. *See* 85 FR 42238; 2010 Handbook (rescinded) (discussing requirement of section 401 certification when there is a point source discharge).[30]

Although the Agency is retaining the same interpretation of "discharge" as the 2020 Rule, to simplify the regulatory architecture, the Agency is proposing to remove the definition of "discharge" currently located at § 121.1(f) and instead incorporate those definitional concepts into the regulatory text at proposed § 121.2 which discusses when certification is required. The Agency believes this simpler approach will provide greater clarity about the nature of discharges that trigger the need for section 401 certification or waiver.

Just as the Agency is not proposing to define the term "discharge" for purposes of section 401, the Agency is not proposing a distinct definition of the term "point source." Rather, the Agency will continue to rely on the definition of point source in section 502(14) of the CWA,[31] as interpreted by the courts.[32] For example, courts have concluded that bulldozers, mechanized land clearing machinery, and similar types of equipment used for discharging dredge or fill

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[30] The United States has suggested that section 401 requires the discharge to be from a point source in briefs filed before both the Ninth Circuit and the Supreme Court. *See, e.g.,* Briefs of the United States in *ONDA v. Dombeck*, Nos. 97-3506, 97-35112, 97-35115 (9th Cir. 1997), *ONDA v. USFS*, No. 08–35205 (9th Cir. 2008), Amicus brief of the United States in *S.D. Warren Co. v. Maine Bd. of Envtl. Prot*., No. 04-1527 (January 9, 2006).

[31] The CWA defines point source as "any discernible, confined and discrete conveyance … *from which pollutants are or may be discharged*." 33 U.S.C. 1362(14) (emphasis added).

[32] In *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*, the Supreme Court addressed the question whether the CWA requires a NPDES permit under section 402 of the Act when pollutants originate from a point source but are conveyed to navigable waters by groundwater. 140 S. Ct. 1462 (2020). The Court held that "the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge." *Id*. at 1476 (emphasis in original). The Court articulated a number of factors that may prove relevant for purposes of section 402 permitting. *Id*. at 1476-77. Consistent with the rationale of the Court's decision in *County of Maui*, any point source discharge that is the functional equivalent of a direct discharge into navigable waters would also trigger section 401. This broad interpretation is also consistent with *S.D. Warren*, 547 U.S. at 375.

material are "point sources" for purposes of the CWA. *See, e.g.*, *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988). On the other hand, courts have concluded that a water withdrawal is not a point source discharge and therefore does not require a water quality certification.[33]

4. "Into the navigable waters"

Section 401 says that certification is required for an activity that "may result in any discharge into the navigable waters." 33 U.S.C. 1341(a)(1). The term "navigable waters" is defined as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The proposed rule provides that section 401 certification is required for Federal licenses or permits where there is a potential discharge into a water of the United States. This interpretation is consistent with the plain language and legislative history of the CWA. *See* H.R. Rep. No. 91-911, at 124 (1972) ("It should be clearly noted that the certifications required by section 401 are for activities which may result in any discharge into navigable waters."). This interpretation is also consistent with the Agency's longstanding position and practice. *See, e.g.*, 2010 Handbook, at 3, 5 (rescinded) ("Since [section] 401 certification only applies where there may be a discharge into waters of the [United States], how states or tribes designate their own waters does not determine whether [section] 401 certification is required.").

Potential discharges into state or tribal waters that are not "waters of the United States" do not trigger the requirement to obtain section 401 certification. However, as discussed in section V.E. in this preamble, once the certification requirement is triggered by the prerequisite of a point source discharge into a water of the United States, the certifying authority may choose to grant, condition, or deny water quality certifications based on the potential impact of the "activity as a whole" on waters of the United States and other state or tribal waters.

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[33] *See, e.g.*, *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) (holding that withdrawal of water from lake does not constitute discharge for CWA section 401 purposes).

B. Pre-filing Meeting Request

EPA is proposing to retain the requirement for a project proponent to request a pre-filing meeting with the certifying authority at least 30 days before submitting a water quality certification request. However, recognizing the variety of project types and complexities, the proposed rule also provides certifying authorities with the flexibility to waive or shorten this pre-filing meeting request requirement. This requirement to request a pre-filing meeting will ensure that certifying authorities have an opportunity, should they desire it, to receive early notification and to discuss the project with the project proponent before the statutory timeframe for review begins. The intent of this proposed provision is to support early engagement and coordination between certifying authorities and project proponents.

The 2020 Rule introduced the pre-filing meeting request requirement to encourage early coordination between parties to identify needs and concerns before the start of the reasonable period of time. EPA interpreted the term "request for certification" in CWA section 401(a)(1) as being broad enough to include an implied requirement that, as part of the submission of a request for certification, a project proponent shall also provide the certifying authority with advance notice that a certification request is imminent. The time (no longer than one year) that certifying authorities are provided under the CWA to act on a certification request (or else waive the certification requirements of section 401(a)) provided additional justification in this context to interpret the term "request for certification" to allow EPA to require a pre-filing meeting request.

The 2020 Rule proposal originally limited the pre-filing meeting request requirement to project proponents seeking certification in jurisdictions where EPA acts as the certifying authority. However, in response to stakeholder feedback on the proposed 2020 Rule, the Agency extended the pre-filing meeting request requirement to all project proponents. As a result, the final 2020 Rule required all project proponents to request a pre-filing meeting at least 30 days prior to submitting a water quality certification request. 85 FR 42241 (July 13, 2020). The 2020 Rule did not provide any mechanism for certifying authorities to waive or otherwise alter the 30-

day period between a project proponent requesting a pre-filing meeting and subsequently submitting a certification request. Instead, there was a mandatory 30-day period that had to pass before the project proponent could submit a certification request.

During pre-proposal outreach on this proposed rule, some stakeholders found the pre-filing meeting request requirement to be essential to an efficient certification process. Some stakeholders shared that the pre-filing meetings were helpful in allowing certifying authorities to inform project proponents of the specific project information needed for an effective evaluation of the certification request. However, some stakeholders expressed concern about the mandatory 30-day "waiting period" between the pre-filing meeting request and the certification request, particularly in emergency permit situations. Stakeholders also noted that the 30-day mandatory period could create delays for Federal licensing or permitting agencies. Some stakeholders noted that most certification requests involve smaller, less complex projects and requiring the project proponent to request a pre-filing meeting and wait 30 days before submitting a request for certification was unnecessarily burdensome. Stakeholders suggested that EPA should add flexibility to the process and give certifying authorities the ability to waive the pre-filing meeting request (*e.g.*, for smaller and less complex projects and emergencies).

Pre-filing meeting requests ensure that certifying authorities can receive early notification of and discuss the project and potential information needs with the project proponent before the statutory "reasonable period of time" for certification review begins (*e.g.*, allow the certifying authority to collect important details about a proposed project and its potential effects on water quality). Under this proposal, a project proponent is required to request a pre-filing meeting from the certifying authority in accordance with the certifying authority's applicable submission procedures at least 30 days prior to submitting a certification request, unless the certifying authority waives or shortens this requirement. Similar to the approach taken under the 2020 Rule, EPA is not proposing to define by regulation the process or manner for project proponents to submit pre-filing meeting requests. Rather, EPA intends the term "applicable submission

procedures" to mean the submission procedures deemed appropriate by the certifying authority. EPA intends for certifying authorities to communicate to project proponents when a pre-filing meeting request is necessary and when a pre-filing meeting request is waived. For example, certifying authorities could either require or waive the pre-filing meeting request requirement for all projects or specific types of projects. EPA recommends that certifying authorities make this information readily available to project proponents in an easily accessible manner to allow for a transparent and efficient process (*e.g.*, posting a list of project types that require a pre-filing meeting request on the certifying authority's website).

When EPA acts as the certifying authority, EPA would generally find the following submission procedures to be appropriate. First, EPA recommends that project proponents submit a pre-filing meeting request to the Agency in writing. As discussed in section V.C in this preamble, the project proponent must submit documentation that a pre-filing meeting was requested as a component of its certification request when EPA is acting as the certifying authority (or where a state or tribe does not have certification request requirements), unless a pre-filing meeting request has been waived. In light of this requirement, EPA recommends that pre-filing meeting requests to the Agency be submitted in writing. Second, the Agency recommends that project proponents include the following information, as available, in any written request for a pre-filing meeting with EPA:

1. A statement that it is "a request for CWA section 401 certification pre-filing meeting,"
2. The name of the project proponent and appropriate point of contact,
3. The name of the tribe or jurisdiction for which EPA is serving as the certifying authority,
4. The planned project location (including identification of waters of the United States into which any potential discharges would occur),
5. A list of any necessary licenses/permits (*e.g.*, state permits, other Federal permits, etc.),
6. The project type and a brief description of anticipated project construction and operation activities, and
7. The anticipated start work date.

EPA is requesting comment on whether it should define "applicable submission procedures" for itself in regulatory text, or only provide recommended procedures in the final rule preamble and future guidance. Additionally, the Agency is requesting comment on whether

it should define "applicable submission procedures" in regulatory text for all certifying authorities, and if so, what those "applicable submission procedures" should include (*e.g.*, the items listed above for pre-filing meetings with EPA, and/or other items). The Agency also requests comment on the proposed minimum timeline between the submission of a pre-filing meeting request and certification request. If a requirement to submit a pre-filing meeting request remains in the final rule and "applicable submission procedures" remains undefined, EPA intends to develop its own recommended procedures for pre-filing meeting requests and will make those procedures available to the public during the implementation of any final rule. These recommendations will reflect some of EPA's own procedures when the Agency is the certifying authority, which are described, in part, above.

The Agency is also proposing to provide certifying authorities with the flexibility to waive or shorten the pre-filing meeting request requirement. As indicated in pre-proposal input, all projects do not necessarily require early engagement between the project proponent and certifying authority. For example, less complex, routine projects may not necessitate the same level of early engagement as a large, complex project. The Agency's view is that the proposed requirement to submit a pre-filing meeting request is responsive to stakeholder concerns and suggestions mentioned above about the need for early engagement between the project proponent and a certifying authority. Additionally, the Agency recognizes that states and tribes are in the best position to determine whether a particular project (or class of projects) would benefit from such early coordination. Accordingly, this proposed requirement includes a waiver provision that reflects both cooperative federalism principles and the reality that not every project will benefit from a pre-filing meeting. The Agency recommends that certifying authorities clearly communicate to project proponents their expectations for pre-filing meetings and requests for pre-filing meeting waivers (*e.g.*, whether they may grant waivers, either categorically or on an individual basis, and any procedures and deadlines for submission of requests and the grant of waivers) so that project proponents may clearly and efficiently engage in the certification

process. EPA is requesting comment on whether the project proponent should have the opportunity to participate in determining the need for a pre-filing meeting request. For example, should there be a process for the project proponent to ask the certifying authority to waive the pre-filing meeting request requirement?

Like other certifying authorities, EPA would have the discretion to waive the pre-filing meeting request requirement. Generally, EPA expects that it will provide written acknowledgement that the pre-filing meeting request has been received within 5 days of receipt. In its written response, the Agency will also state whether it has determined that the pre-filing meeting will be waived or when (if less than 30 days) the project proponent may submit the certification request. The 2020 Rule provides that the certifying authority is not obligated to grant or respond to a pre-filing meeting request. *See* 40 CFR 121.4(b). The Agency is proposing to delete this provision as unnecessary because the proposed regulatory text at § 121.4 does not compel any action by the certifying authority. Accordingly, the Agency does not find it necessary to expressly reiterate what the certifying authority is not obligated to do. If a certifying authority fails to communicate whether it wants to waive or shorten the pre-filing meeting request requirement, then the project proponent must wait 30 days from requesting a pre-filing meeting to submit its request for certification. The Agency is requesting comment on whether it should exclude any particular project types from the pre-filing meeting request requirement and process. The Agency is also requesting comment on whether it should specify that all certifying authorities should respond with written acknowledgement and determination of the need for a pre-filing meeting and timeline within 5 days of receipt of the pre-filing meeting request, whether it should define the pre-filing meeting waiver process in regulation (either for EPA or all certifying authorities), or whether it should maintain certifying authority flexibility in setting the process.

The Agency is not proposing to define the pre-filing meeting process, *e.g.*, define meeting subject matter or meeting participants. In the 2020 Rule, the Agency "encouraged" but

did not require the project proponent and the certifying authority to take certain steps with respect to the pre-filing meeting process. *See* 40 CFR 121.4(c)-(d). The Agency is proposing to remove these recommendations from the regulatory text because (1) they were not expressed as, or intended to be, regulatory requirements and (2) the Agency believes that certifying authorities and project proponents are best suited to determine the optimal pre-filing meeting process on a project-by-project, project type, or general basis. EPA encourages project proponents and certifying authorities to use the pre-filing meeting to discuss the proposed project, as well as determine what information or data is needed (if any) as part of the certification request to enable the certifying authority to take final action on the certification request within the reasonable period of time. During the pre-filing meeting, project proponents could share a description of the proposed project location and timeline, as well as discuss potential impacts from the proposed project to waters of the United States and other water resources. Certifying authorities could use the meeting as an opportunity to provide information on how to submit certification requests (*e.g.*, discuss procedural expectations for a certification request). Certifying authorities should also consider including the Federal agency in the pre-filing meeting process for early coordination. Additionally, the proposed provision provides flexibility for the certifying authority to determine if the pre-filing meeting request is fulfilled by any pre-application meetings or application submissions to the Federal licensing or permitting agency. Generally, EPA recommends that certifying authorities provide clear expectations for pre-filing meetings to ensure they are used efficiently and effectively. As mentioned previously, EPA intends to develop recommended procedures for pre-filing meeting requests to make available to the public during rule implementation.

This proposed approach provides sufficient flexibility (consistent with the Act's cooperative federalism framework) to allow states and tribes to decide which projects (or project categories) require the type of early coordination reflected in a pre-filing meeting. EPA is requesting comment on the proposed approach and whether EPA should define the pre-filing

meeting request process in more detail for other certifying authorities (*e.g.*, defining the contents of the pre-filing meeting request). The Agency is also soliciting comment on an alternate approach where the Agency would not include a pre-filing meeting request requirement at all, which some stakeholders supported during pre-proposal outreach.

C. Request for Certification

EPA is proposing that, once a project proponent has requested a pre-filing meeting (unless waived by the certifying authority), the project proponent may submit a certification request in accordance with the certifying authority's applicable submission procedures. Section 401(a)(1) provides that the certifying authority's reasonable period of time to act starts after a certifying authority is in "receipt" of a "request for certification" from a project proponent. 33 U.S.C. 1341(a).[34] The statute does not define either "request for certification" or "receipt."

In the 2020 Rule, the Agency defined "certification request" for all certifying authorities and asserted that ambiguities in the statutory language had led to inefficiencies in the certification process. 40 CFR 121.5; *see* 85 FR 42243. In particular, the 2020 Rule preamble provided that states and authorized tribes could not rely on state or tribally defined "complete applications" to start the certification process, but rather must rely on a certification request as defined in EPA's regulation to initiate the process. The Agency relied on *New York State Department of Environmental Conservation v. FERC*, in which the Court of Appeals for the Second Circuit rejected New York's argument that the section 401 process "begins only once [the state agency] deems an application 'complete'" and, instead, agreed with FERC that the section 401 review process begins when the state receives a request for certification. 884 F.3d 450, 455 (2d Cir. 2018) ("*NYSDEC*"). The court found that "[t]he plain language of Section 401 outlines a bright-line rule regarding the beginning of review" and reasoned that "[i]f the statute

[34] "If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a *request for certification*, within a reasonable period of time (which shall not exceed one year) after *receipt of such request*, the certification requirements of this subsection shall be waived with respect to such Federal application." (emphasis added).

required 'complete' applications, states could blur this bright-line rule into a subjective standard, dictating that applications are 'complete' only when state agencies decide they have all the information they need." *Id*. at 455-56.

In *NYSDEC,* the Second Circuit held that the plain language of section 401(a)(1) provides that the reasonable period of time begins after receipt of the request for certification, not when a certifying authority deems the request "complete." The Second Circuit did not, however, decide the separate question of whether EPA or certifying authorities have the authority to establish—in advance of receiving a certification request—a list of required contents for such a request. Accordingly, the court's holding that the reasonable period of time begins after "receipt" does not preclude EPA from establishing such a list of minimum "request for certification" requirements, or from allowing certifying authorities to add requirements to EPA's list or develop their own lists of request requirements. Because the statute does not expressly define the term "request for certification," EPA and other certifying authorities are free to do so in a manner that establishes—in advance of receiving the request—a discernable and predictable set of requirements for a certification request that starts the reasonable period of time. Establishing such a list of required elements in advance is consistent with the rationale of *NYSDEC* that criticized the state for relying on its "subjective" determination that the request was "complete."

EPA is proposing minor revisions to the term "receipt" to clarify for all stakeholders that the reasonable period of time begins to run after a certifying authority receives a certification request as that request is defined either by EPA or the certifying authority in accordance with its applicable submission procedures. EPA is also proposing to remove the language in the regulatory text at § 121.5(a) that requires a project proponent to submit a certification request to a Federal agency. Section 401(a)(1) requires a project proponent to obtain certification or waiver from a certifying authority, not a Federal agency. The proposed definition of "receipt" relies upon the certifying authority, and not the Federal agency, to determine whether the certifying authority has received a request for certification from a project proponent, and as discussed

below, the Agency is proposing that the certifying authority sends written confirmation of receipt of the request for certification to the project proponent and Federal agency. Therefore, it is unnecessary for a project proponent to submit a request for certification to the Federal agency in addition to sending it to the certifying authority.

New to this proposal and as discussed in the next section, EPA is proposing that every "request for certification" include a copy of the relevant draft Federal license or permit. EPA intends for this new requirement to ensure that states and tribes have the critical information they need to make a timely and informed certification decision. Accordingly, under this proposal a project proponent cannot submit a request for certification to a certifying authority until after a Federal agency has developed a draft license or permit. In an effort to be further responsive to state and tribal input and the cooperative federalism principles of the Act, unlike the 2020 Rule, EPA is proposing additional contents of a "request for certification" in only two circumstances: (1) when EPA acts as the certifying authority and (2) when a state or authorized tribe has not established its own definition of "request for certification" in regulation.

1. Minimum contents of a request for certification

Although the proposed rule would require project proponents to initiate engagement with a certifying authority through a pre-filing meeting request, the timing for a certifying authority to review and act on a request for certification for a federally licensed or permitted project starts only when the certifying authority receives a request for certification. EPA and stakeholders alike have recognized the importance of ensuring that adequate information is available to initiate and inform the certification review process, given the relatively limited period of time a certifying authority has to review a project under section 401 (*i.e.*, a "reasonable period of time" not to exceed one year). However, EPA recognizes that stakeholders' views vary on whether it is possible to define exactly what information is sufficient or necessary to start the review process.

In 1971, the Agency opted to not define what information, if any, was sufficient to start the review process for all certifying authorities and instead opted to define the information only

for EPA when it acts as the certifying authority. 40 CFR 121.22 (2019). As a result, over the last approximately 50 years, many states and tribes established their own requirements for what constitutes a request for certification, also called a "certification request," typically defining it as a so-called "complete application." *See, e.g.,* Cal. Code Regs. Tit. 23, sec. 3835; La. Admin. Code tit. 33, sec. IX-1507; Ohio Admin. Code 3745-32-03. Prior Agency guidance acknowledged this practice. *See* 1989 Guidance, at 31 (April 1989) ("Thus, after taking the federal agencies' regulations into account, the State's 401 certification regulations should link the timing for review to what is considered receipt of a complete application."); *see also* 2010 Handbook (rescinded) ("States and tribes often establish their own specific requirements for a complete application for water quality certification…. The advantage of a clear description of components of a complete [section] 401 certification application is that applicants know what they must be prepared to provide, and applicant and agencies alike understand when the review timeframe has begun.").

As discussed above, the 2020 Rule defines the term "certification request" and the contents of a certification request for all certifying authorities and does not allow certifying authorities to modify or add to these requirements. *See* 40 CFR 121.1(c), 121.5. Generally, these requirements include basic project information such as identifying the project proponent and a point of contact, and identifying the location and nature of any potential discharge that may result from the proposed project and the location of receiving waters. *See id.* at § 121.5.

In pre-proposal outreach for this rule, many certifying authorities expressed concerns about the Agency's decision in the 2020 Rule to provide a complete list of elements that define a certification request. These certifying authorities noted that it is unreasonable to impose a "one size fits all" definition on certification requests in light of different state legal requirements (*e.g.*, certification fee requirements, antidegradation laws) or to expect states and tribes to be able to act in a timely, informed manner without more specific information about the proposed project. Although the 2020 Rule did not prohibit certifying authorities from requesting additional

information after receiving a request for certification, several certifying authorities argued that the rule's bifurcated approach (*e.g.*, separate lists of Federal and state requirements) created workload issues for certifying authorities and caused confusion among project proponents. At least one certifying authority noted that the 2020 Rule requirements resulted in the state issuing more denials due to project proponents not submitting information necessary for project evaluation. Conversely, several project proponents have argued that a definitive list of contents of a request for certification is essential to provide clarity and consistency for project proponents and certifying authorities.

In this rulemaking, EPA is proposing that a request for certification must in all cases be in writing, signed, dated, and include a copy of a draft license or permit (unless legally precluded from obtaining such a copy) and any existing and readily available data or information related to potential water quality impacts from the proposed project (*e.g.*, Environmental Impact Statement (EIS), water quality data collected by the project proponent). Although this proposed approach defines limited requirements for all certification requests, the Agency is not providing an exclusive definition of request for certification, as it did in the 2020 Rule. Rather, the Agency is proposing to define requirements it views as necessary for an efficient and consistent certification process. The Agency is also proposing to remove the definition of "certification request" currently located at 40 CFR 121.1(c), which describes the components of a request for certification, and instead incorporate those same definitional elements directly into the proposed language at § 121.5(a). The Agency believes incorporating the definitional elements into the relevant regulatory section for request for certification will provide greater clarity about the contents of a request for certification.

Because the proposed interpretation of a "request for certification" includes submission of the relevant draft Federal license or permit for the proposed project, a project proponent would not be able to submit a request for certification *until* a Federal agency develops and provides it with a draft license or permit for the proposed project. Section 401 does not specify when a

request for certification must be submitted in relation to the related Federal licensing or permitting process, nor does the 1971 Rule or 2020 Rule specify when a project proponent must submit a request for certification. Because the text of section 401 does not define the contents of a "request for certification" or specify at what point in the Federal licensing or permitting process such a request must or may be submitted to the certifying authority, the statute is ambiguous on both points. As the agency charged with administering the CWA, EPA is entitled to deference for its reasonable interpretation of the statute that a draft license or permit must be included. *See Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003); *NYSDEC*, 884 F.3d at 453, n.33.

As discussed below, EPA's proposed interpretation of the term "request for certification" to include a draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project is reasonable because it ensures that the certifying authority has arguably the most important pieces of information—the water quality-related conditions and limitations the Federal agency has preliminarily decided to include in the draft license or permit and information informing that preliminary decision—to evaluate and determine whether it can certify (with or without additional conditions and limitations) that the project will comply with all applicable Federal and state water quality requirements. Without the ability to see and evaluate what conditions and limitations the Federal agency has preliminarily decided to include in its license or permit and the information informing that decision, the certifying authority might be inclined to deny certification as a protective measure against the unknown potential effects from the project or, in the alternative, it may include in its certification potentially unnecessary conditions as a hedge against what the Federal agency may decide to include. Because the certifying authority would have the benefit of seeing the Federal agency's preliminary conditions during its review of the draft license and permit, including its water quality-related limitations and requirements, and any existing and readily available data or information related to potential water quality impacts from the proposed

project (such as an EIS), certifying authorities should be able to complete their certification review in less time and deliver certifications with fewer and more targeted and effective conditions. EPA also anticipates that this proposed requirement may reduce redundancies between the certification and Federal licensing or permitting processes. Providing certifying authorities with any existing and readily available data or information related to potential water quality impacts from the proposed project, such as studies or an EIS or Environmental Assessment (EA) or other water quality monitoring data, may reduce the need for duplicative studies and analyses. EPA intends for such "existing and readily available data or information related to potential water quality impacts from the proposed project" to include both data or information that informed the Federal agency's development of the draft license or permit as well as any other existing data or information the project proponent may have readily available.

Under this proposal, if a project proponent is legally precluded from obtaining a copy of a draft license or permit, the project proponent would not be required to provide a copy. However, in this instance, a project proponent would still be required to obtain and produce any existing and readily available data or information related to potential water quality impacts from the proposed project, such as a copy of an EIS or EA.

The Agency is aware that some Federal agencies allow project proponents to submit certification requests shortly after a license or permit application is received and before there is a draft license or permit. *See, e.g.*, 18 CFR 5.23 (requiring a FERC hydropower license applicant to provide a copy of a water quality certification or request for certification "no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis"); 33 CFR 325.2(b)(1) (requiring a Corps district engineer to notify the applicant if they determine that a water quality certification is necessary in processing an application); *cf*. 40 CFR 124.53(a)-(c) (providing for a request for certification to occur either before or after EPA prepares a draft NPDES permit). The Agency is not aware of any regulatory-based reason why Federal licensing or permitting agencies could not manage their internal procedures so that a

certifying authority's "reasonable period of time" did not begin to run until after it had received a copy of the draft license or permit. Moreover, as discussed above, it is reasonable to start the certification process only after a draft license or permit for the proposed project is available. To be clear, EPA is not proposing to require the project proponent to request certification immediately upon development or receipt of the draft license or permit. For example, the Corps is required to request certification on the nationwide permits (NWPs) when they are renewed every five years. First, the Corps proposes the draft NWPs and takes comment on the proposal, and later finalizes the NWPs after considering public comment. Under this proposed rule, the Corps may request certification on the NWPs after it receives and considers public comment on the proposal but before finalizing the NWPs. In that scenario, the Corps would provide the non-finalized NWP to the certifying authority as the draft permit in its request for certification to satisfy the proposed requirements. EPA encourages project proponents to work with certifying authorities to determine when it is appropriate to submit a request for certification after development of the draft license or permit to allow for an informed and efficient certifying authority review. Furthermore, EPA is not proposing that the Federal agency must solicit public comment on its draft license or permit or create a new regulatory process to engage the public (*e.g.*, notice and comment); rather, the Agency is proposing that the Federal agency provide a draft version of its license or permit for that specific proposed project prior to initiating the certification process, for the limited purpose of helping the certifying authority reach a proper decision on the request for certification. EPA is requesting comment on whether the Federal agency, as opposed to the project proponent, should provide a copy of the draft license or permit to the certifying authority when it is not otherwise already publicly available.

The Agency is not proposing to require that the project proponent submit a *final* license or permit in its certification request because a final Federal license or permit may not be issued until *after* a certification or waiver is obtained by the project proponent. 33 U.S.C 1341(a)(1) ("No license or permit shall be granted until certification required by this section has been

obtained or has been waived as provided in the preceding sentence.") Therefore, requiring a copy of the final license or permit to initiate the certification process would be inconsistent with the plain language of section 401.

The Agency is requesting comment on its proposed approach. The Agency is also requesting comment on an alternative approach, under which a project proponent may submit either a copy of its officially submitted license or permit application or a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project.

2. Additional contents in a request for certification

As discussed above, the Agency is proposing that every request for certification include a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project. The Agency is also proposing to identify a set of additional contents that a project proponent must include in a request for certification when EPA acts as the certifying authority. The Agency is also proposing that the same set of additional contents would be required in each request for certification to a state or authorized tribe that has not established its own definition of a "request for certification" under state or tribal law. These additional contents would not apply where a state or authorized tribe has established its own list of requirements for a request for certification. As discussed above, this proposed approach contrasts with the approach taken in the 2020 Rule, which defines the contents of a certification request for all certifying authorities. However, it is a reasonable—and more flexible—approach to defining the term "request" and consistent with *NYSDEC.* That decision holds that the reasonable period of time begins after receipt of a request for certification and not when a state deems it "complete;" it does not preclude EPA or other certifying authorities from defining—in advance—those contents a certification request must contain. As discussed below, this approach is consistent with stakeholder input and the cooperative federalism principles central to section 401 and the CWA.

The Agency agrees it is important for project proponents to have clarity and certainty during the certification process. In order to effectuate Congress' goals for section 401 in the limited amount of time provided by the Act, it is reasonable that certifying authorities should be able to define what information, in addition to a draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project, is necessary to make an informed decision regarding protecting their water quality from adverse effects from a federally licensed or permitted activity. *See* discussion in Section IV.A in this preamble on the legislative history of section 401. This approach will allow certifying authorities to act on certification requests in a timely and informed manner, while providing project proponents with clarity regarding expectations for the certification process. Pre-proposal input on this rulemaking revealed that defining an exclusive list of components for certification requests for all certifying authorities would not necessarily result in a more efficient or timely process. As noted above, several stakeholders asserted that the 2020 Rule led to workload challenges, general confusion for project proponents, and, in at least one state, an increase in denials. The Agency's proposed approach here will allow for a transparent and timely process that respects the role of state and tribal certifying authorities under the cooperative federalism framework of section 401.

First, this proposed approach will reduce project proponent confusion. In all instances, the proposed rule defines the term "request for certification" to include a copy of a draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project. It then defines additional contents that a certification request must include when EPA acts as a certifying authority or where a state or authorized tribe does not define a certification request in its regulations. Providing a defined list of additional contents for a certification request where EPA acts as a certifying authority, or where a state or tribe does not have a defined list in regulation, will provide project proponents with clear expectations for starting the process. Implicit in this requirement is an understanding that

certifying authorities that wish to define their own additional requirements for a certification request have the authority to do so in regulation. Additionally, this proposed approach should be familiar to project proponents who would have followed specific requirements established by states and tribes during the last approximately 50 years. The proposed approach also addresses project proponent concerns about certifying authorities that, in the past, may have unexpectedly required additional information from the project proponent to satisfy the request for certification requirement before starting the clock on the "reasonable period of time." Under the approach EPA proposes here, the reasonable period of time starts after receipt of a "request for certification," which is defined to mean a request that contains the contents required by EPA's proposed regulations and any additional state or tribal requirements.

Second, this approach will allow certifying authorities to act on certification requests in a more efficient manner. The Agency generally agrees with stakeholders that the Agency cannot tailor the requirements of a certification request to fit every project or state or tribal law. This proposed approach recognizes the importance of ensuring that states and tribes are empowered to determine what information is necessary to initiate the certification process. Although this proposed rule does not preclude certifying authorities from asking for more information once they receive a certification request and the reasonable period of time begins, allowing states and authorized tribes to define additional contents of a certification request may reduce the need for such additional requests.

Although the Agency is proposing to allow states and authorized tribes to define their own additional requirements for a certification request, the proposed approach provides a clear backstop for those states or authorized tribes who do not choose to define any additional requirements in regulation. The Agency expects that those states and authorized tribes who choose to define additional contents for a certification request would do so clearly enough to provide project proponents with full transparency as to what is required. As discussed above, some certifying authorities rely on a "complete application" to start the certification review

process. In the Agency's view, a state requirement for submittal of a complete application, when the contents of such complete application are clearly defined in regulation, will not necessarily lead to a "subjective standard." *NYSDEC*, 884 F.3d at 455-56. In fact, the Agency observes that the use of a "completeness" standard for applications or similar documents is not a novel concept in CWA implementing regulations.[35] Both EPA and the Corps have developed regulations setting out requirements for "completeness" or "complete applications" to initiate the permitting process. *See* 40 CFR 122.21(e) (describing "completeness" for NPDES applications); 33 CFR 325.1(d)(10) (describing when an application is deemed "complete" for section 404 permits). Neither CWA section 402 or section 404 uses the word "complete" to modify the term "application" in the statute, yet the agencies have reasonably interpreted the term "application" in those contexts to allow for a "completeness" concept that provides a clear and consistent framework for stakeholders involved in the section 402 and 404 permitting processes. The Agency is unaware of significant issues with the use of "complete applications" in either the section 402 or section 404 permitting processes or a concern that it has led to a "subjective standard."

The Agency is requesting comment on this proposed approach, including any examples or data about state or tribal certification request practices, including a requirement for a "complete request," that may have delayed the certification process. The Agency also requests comment on examples or circumstances where a certifying authority has applied a subjective or open-ended definition of "complete application" to certification requests, including examples of such in certifying authority regulations. EPA is also seeking comment on whether it should take an alternate approach whereby the Agency would define the minimum additional components of a certification request for all certifying authorities and if so, what those minimum additional components should include (*e.g.*, the minimum additional components proposed to apply to EPA

[35] The use of "complete" applications is also applied in other Federal environmental realms (*e.g.*, the Safe Drinking Water Act, the Clean Air Act). *See, e.g.*, 40 CFR 144.31, 40 CFR 51.103, appendix V to part 51.

when it acts as a certifying authority, as discussed below).

The Agency is proposing to require that a certification request made to EPA, or to states or tribes without their own definitions of "request for certification" as discussed above, include five additional components. As discussed below, these five components contain some similarities to the 1971 Rule, with revisions to provide further clarification and efficiency for project proponents and EPA when it acts as a certifying authority and when a state or authorized tribe has not established its own definition of "request for certification."

As stated above, the statute does not define the contents of a "request for certification" to EPA, nor does the legislative history discuss these components. The 1971 Rule required project proponents to submit a signed certification request with "a complete description of the discharge involved in the activity" to EPA when it acts as the certifying authority. 40 CFR 121.22 (2019). Specifically, the 1971 regulation required project proponents to include five mandatory components to provide a "complete description of the discharge." *Id.*

The 2020 Rule precludes state or tribal definitions of what must be included in a "certification request." Instead, it provides a general definition of "certification request" applicable to all certifying authorities and two different lists of documents and information that must be included in all certification requests: one list for individual licenses and permits and a separate list for the issuance of a general license or permit. 40 CFR 121.5; *see also* 85 FR 42285. The preamble asserted that these were objective components that would not "require subjective determinations about whether the request submittal requirements have been satisfied." 85 FR 42246. The nine components for a certification request on an individual license or permit are similar to the 1971 Rule, with additional components that required project proponents to include documentation of a pre-filing meeting request, a list of other project authorizations, and attestations regarding the contents of the request and that a request was being submitted. *Id*. at 42285.

Prior to the 2020 Rule, some states and authorized tribes established their own

requirements for a certification request that included more information than the 2020 Rule. In pre-proposal outreach for this rulemaking, several certifying authorities noted that the 2020 Rule's list of components for a certification request failed to account for information that may be required to comply with state public notice requirements[36] and state antidegradation policies. As a result, these certifying authorities asserted that the list limited their ability to engage in robust, meaningful public engagement on certification requests or ensure that a project would comply with EPA-approved water quality standards.

As noted above, although the Agency is proposing that all requests for certification must include a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project, the Agency is declining to define the additional contents of a certification request for those states or authorized tribes who have regulations that identify the contents of a certification request because it is difficult to tailor the contents at a national level to fit all state and tribal laws and regulations. However, EPA is proposing to define additional contents of a certification request for EPA when it acts as a certifying authority *and* for states or authorized tribes who do not have regulations on the components of a certification request. EPA is proposing that a certification request to EPA when it acts as the certifying authority, or to a state or tribe who does not have regulations on the components of a certification request, must also contain the following five components, if not already included in the draft license or permit:

1. The name and address of the project proponent;
2. The project proponent's contact information;
3. Identification of the applicable Federal license or permit, including Federal license or permit type, project name, project identification number, and a point of contact for the Federal agency;
4. Where available, a list of all other Federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed activity and current status of each authorization; and

[36] CWA section 401(a)(1) states that a "State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it."

5. Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission requirements, unless a pre-filing meeting request has been waived.

Like the 1971 Rule and 2020 Rule, the Agency proposes to require basic background information about the project proponent, including name, address, and contact information. Consistent with the definition for "project proponent" proposed at § 121.1(j), this information may include the name, address, and contact information for a project proponent's agent or contractor, where relevant, in addition to the primary project proponent. This additional contact information is important for the Agency to ensure that the appropriate representatives are aware of the certification requirements and can be contacted throughout the certification process. The proposed rule also requires project proponents to identify the Federal license or permit for which they are seeking certification, including information that identifies the license or permit type, name, and number, as well as a point of contact at the respective Federal licensing or permitting agency. Similar to the 2020 Rule, the Agency also proposes to require that the project proponent provide a list of other authorizations that are required for the proposed activity and the current status of such authorizations, where applicable. This requirement will allow the Agency to assess how water quality impacts may be addressed through other Federal, state, or local authorizations and potentially reduce redundancies or inconsistencies between the certified license or permit and other authorizations. When the project proponent is a Federal agency seeking certification, the Agency does not expect the Federal agency to be able to produce such a list. Typically, when a Federal agency seeks certification, it is seeking certification on general licenses or permits that would be used by future project applicants. Therefore, at the time of the request for certification, the Federal agency is likely unable to provide any information on which authorizations, if any, are required for such a future project. Similar to the 2020 Rule, the Agency also proposes to require a project proponent to submit documentation that the proponent requested a pre-filing meeting, unless a pre-filing meeting request has been waived. The documentation should be in writing, such as a copy of the email requesting the pre-filing meeting. As discussed in section

V.B in this preamble, a certifying authority may waive the requirement for a pre-filing meeting request. In that event, the project proponent would not need to produce documentation of a pre-filing meeting request.

The Agency is not proposing to retain the contents of the 2020 Rule at § 121.5(b)(4) and (5) and (8) and (9); the 1971 Rule also contained similar contents to § 121.5(b)(4) and (5). *See* 40 CFR 121.22(b)-(c), (e) (2019). Section 121.5(b)(4) and (5) are unnecessary since the proposed rule requires a project proponent to provide a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project in its request. The Agency also finds it unnecessary to retain the requirements at § 121.5(b)(8) and (9). EPA included the component at § 121.5(b)(8) "to create additional accountability on the part of the project proponent to ensure that information submitted in a certification request accurately reflects the proposed project." 85 FR 42245 (July 13, 2020). EPA is unaware of any issues or concerns that project proponents will not provide accurate information in the request for certification without such attestation. Furthermore, the proposed contents for a request for certification include a copy of the draft license or permit, which presumably incorporates accurate information about the proposed project. Additionally, it is unnecessary for a project proponent to provide specific language explicitly requesting certification because a project proponent is required to submit a request for certification as defined in this proposal. Submitting a request for certification as defined in this proposal should be a clear indication to the certifying authority that the project proponent is seeking certification. Although the Agency is defining the additional components of a certification request when it acts as a certifying authority, this does not preclude EPA from asking for additional information after a certification request is submitted, if the Agency determines additional information is necessary to inform its decision-making on a request for certification.

The Agency is proposing to require a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the

proposed project in all requests for certification of both individual and general licenses and permits. Additionally, the Agency is proposing to require that any additional requirements for a request for certification apply to both requests for individual and general licenses or permits. Unlike the 2020 Rule, the Agency is not proposing to retain a separate list of additional requirements for general licenses and permits. *See* 40 CFR 121.5(c). In the 2020 Rule, EPA introduced a separate list of contents for a request for certification on the issuance of a general license or permit "to account for the distinctions between issuing a general license or permit and issuing a license or permit for a specific project, with respect to the available information at the time of certification." 85 FR 42281 (July 13, 2020). However, EPA does not think there are any information needs beyond the proposed additional requirements unique or specific to a general license or permit. EPA is requesting comment on whether there are such different needs and whether it should create a separate list of additional requirements for general licenses or permits.

EPA is requesting comments on its proposed list of additional components for a certification request when EPA acts as the certifying authority, or where a state or tribe does not define such additional requirements in regulation. Additionally, the Agency is requesting comment on the components as they would apply to state and authorized tribal certification requests, including where available, citations to existing regulations or any data on the time it takes project proponents to comply with these requirements.

The Agency also requests comment on an alternative approach where the project proponent would be required to submit (1) a Federal license or permit *application* instead of a copy of the draft license or permit, (2) any existing and readily available data or information related to potential water quality impacts from the proposed project, and (3) an additional set of components. Under this alternative approach, the project proponent would be required to submit "proposed activity information" with six components, including the following:

> 1. A description of the proposed activity, including the purpose of the proposed activity and the type(s) of discharge(s) that may result from the proposed activity;

2. The specific location of any discharge(s) that may result from the proposed activity;
3. A map and/or diagram of the proposed activity site, including the proposed activity boundaries in relation to local streets, roads, highways;
4. A description of current activity site conditions, including but not limited to relevant site data, photographs that represent current site conditions, or other relevant documentation;
5. The date(s) on which the proposed activity is planned to begin and end and, if known, the approximate date(s) on which any discharge(s) will take place; and
6. Any additional information to inform whether any discharge from the proposed activity will comply with applicable water quality requirements.

This alternative additional information would incorporate some of the information requirements from the 1971 Rule and 2020 Rule and add other items to reflect the additional information that the Agency views necessary to initiate its analysis of a certification request on a Federal license or permit application.

EPA is also proposing to make conforming changes to the part 124 regulations governing the contents of a request for certification of EPA-issued NPDES permits. EPA is proposing to delete 40 CFR 124.53(b), which provides that when EPA receives a permit application without certification, EPA shall forward the application to the certifying authority with a request that certification be granted or denied. EPA is proposing to delete § 124.53(b) because this provision allows a request for certification to precede development of a draft NPDES permit, which is inconsistent with the approach proposed at § 121.5(a). It is worth noting that although § 124.53 currently allows for a request for certification on a permit application, EPA typically requests certification on draft NPDES permits.

EPA is also proposing to delete 40 CFR 124.53(c), which identifies the required contents of a request for certification of an EPA-issued NPDES permit (if certification has not been received by the time the draft permit is prepared). EPA is proposing to delete § 124.53(c) because EPA intends that all requests for certification—including all requests for certification on EPA-issued NPDES permits—follow the regulations proposed at § 121.5. The list of contents at § 124.53(c) differs significantly from the list of contents proposed at § 121.5(c). Further, unlike proposed § 121.5(b), § 124.53(c) is unclear regarding whether requests for certification on EPA-

issued NPDES permits must follow state regulations regarding the contents of a request for certification. Also, as explained at the end of Section V.D.2 of this preamble, the statement required at § 124.53(c)(3) regarding the reasonable period of time is not consistent with the approach to the reasonable period of time proposed at § 121.6.

3. Defining "receipt" of a request for certification

EPA is also proposing to define the term "receipt" to clarify that the reasonable period of time begins on the date that a certifying authority receives a certification request as defined by this proposal, with any additional components identified by the certifying authority in its regulations, and in accordance with its applicable submission procedures. The statute does not define the term "receipt of such request" nor does it define how a certification request must be received by a certifying authority. The 1971 Rule does not address or define the term "receipt", however, the Agency opted to define the term in the 2020 Rule. 40 CFR 121.1(m). The 2020 Rule defined the term "receipt" as "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures." *Id*. In implementation of the 2020 Rule, there was some confusion regarding whether it was the Federal agency's or certifying authority's responsibility to determine that a certification request, as defined by the 2020 Rule, was received. The proposed definition in this proposal clarifies that receipt occurs when the certifying authority receives a certification request that meets its definition for a certification request and complies with applicable submission procedures.

First, the proposed definition of "receipt" acknowledges that a request for certification may largely be defined by the certifying authority. As discussed above, the Agency is proposing to require a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project in all requests for certification, but only require additional components in a request for certification when EPA acts as the certifying authority, or where a state or authorized tribe does not define a certification request in its own regulations. Beyond these proposed Federal regulatory requirements, states

and authorized tribes remain free to identify their own additional contents of a request for certification under state or tribal law.

Second, the proposed definition of "receipt" requires a certification request to be submitted in accordance with the certifying authority's applicable submission procedures. Applicable submission procedures describe the manner in which a certifying authority will accept a certification request, *e.g.*, through certified mail or electronically. The Agency understands that certifying authorities may have different procedures for receiving certification requests (*e.g.*, receiving certification in different formats or requiring the payment of fees), and as such, is not defining a set of standard applicable submission procedures. However, EPA encourages certifying authorities to make their applicable submission procedures publicly available and, where possible, to discuss these procedures at pre-filing meetings. EPA is requesting comment on whether it should define applicable submission procedures.

The statute further provides that the reasonable period of time begins "after receipt of such request." 33 U.S.C. 1341(a)(1). The Agency interprets this to mean that the reasonable period of time begins on the date that the certifying authority receives a certification request that meets the proposed rule's requirements for a certification request, includes any additional certification request components identified in the certifying authority's regulation, and is delivered in accordance with the certifying authority's applicable submission procedures. *See* proposed §121.6(a). The Agency's proposed rulemaking allows the certifying authority the opportunity to confirm that it received a request for certification consistent with this proposal, its additional requirements, and in accordance with its applicable submission procedures. The Agency is proposing to require the certifying authority to confirm in writing for the project proponent and Federal agency the date it received a certification request that meets its definition and is submitted in accordance with its applicable submission procedures. Because the certifying authority must confirm receipt of the request for certification after it receives a request from a project proponent, EPA is proposing to remove the regulatory text at § 121.5(a), which requires a

project proponent to submit a certification request to a certifying authority and Federal agency. Similarly, the Agency is also proposing to remove the regulatory text located at § 121.6(b), which requires the Federal agency to communicate the date of receipt of the request for certification, the reasonable period of time, and the date waiver will occur. The certifying authority is responsible for confirming the date of receipt of a request for certification with the project proponent and Federal agency. As discussed in the next section of this preamble, the Federal agency and the certifying authority may collaboratively set the reasonable period of time. As such, it is unnecessary for the Federal agency to communicate the length of the reasonable period of time and date of waiver to the certifying authority. The Agency is requesting comment on whether there should be a specified timeframe for when the certifying authority should send written confirmation to the project proponent and Federal agency of the date of receipt of the request for certification. The Agency is requesting comment on its proposed definition for receipt and the start of the reasonable period of time.

C. Reasonable Period of Time

1. Reasonable Period of Time Determination

Under section 401, when a certifying authority receives a request for certification, the certifying authority must act on that request within a "reasonable period of time (which shall not exceed one year)." 33 U.S.C. 1341(a)(1). The proposed rule provides Federal agencies and certifying authorities with the ability to jointly set the reasonable period of time, provided the reasonable period of time does not exceed one year from the receipt of the request for certification. Additionally, after the reasonable period of time is set, the Federal agency and certifying authority may agree to extend the reasonable period of time, provided that it does not exceed one year from receipt.

Section 401(a)(1) provides that a certifying authority waives its ability to certify a Federal license or permit if it does not act on a certification request within the reasonable period of time. 33 U.S.C. 1341(a)(1) ("If the State, interstate agency, or Administrator, as the case may

be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."). Other than specifying its outer bound (one year), the CWA does not define what length of time is "reasonable." The 1971 Rule reiterated that a certifying authority would waive its opportunity to certify if it did not act within "a reasonable period of time" and provided that: (1) the Federal licensing or permitting agency determines the length of the reasonable period of time, and (2) the reasonable period of time "shall generally be considered to be six months, but in any event shall not exceed one year." *See* 40 CFR 121.16(b) (2019).

The 2020 Rule provides that the Federal agency sets the reasonable period of time and defined a process for how it should be determined. *See* 40 CFR 121.6. This process specifies when a Federal agency must communicate the reasonable period of time to the certifying authority and identifies factors that the Federal agency must consider when setting the reasonable period of time. *See id*.; 85 FR 42259-60 (July 13, 2020). The 2020 Rule does not maintain the 1971 Rule's six-month default and reiterates that the reasonable period of time could not exceed one year from receipt of the certification request. 40 CFR 121.6. The 2020 Rule also defines the term "reasonable period of time" as the length of time, which is determined in accordance with § 121.6, during which the certifying authority may act on a request for certification. 40 CFR 121.1(l).

Some Federal agencies have promulgated regulations describing a reasonable period of time for section 401 certification in relation to those agencies' licenses or permits. For example, FERC has explicitly defined the "reasonable period" for certifying authority action under section 401 to be one year. *See* 18 CFR 4.34(b)(5)(iii), 5.23(b)(2), 157.22(b). The Corps has routinely implemented a 60-day reasonable period of time for section 401 decisions commencing when the

certifying authority receives a section 401 certification request. *See* 33 CFR 325.2(b)(1)(ii).[37] EPA has established a 60-day reasonable period of time for certifying authorities to act on requests for certifications for draft NPDES permits. *See* 40 CFR 124.53(c)(3).

While project proponents generally supported the reasonable period of time provisions in the 2020 Rule, most states, tribes, and non-governmental organizations expressed concern with various aspects of its provisions. Many states and tribes expressed concern that the Federal agency is afforded the sole authority to set the reasonable period of time, and some recommended that the certifying authority alone should be able to determine the reasonable period of time. Some stakeholders suggested that a rule replacing the 2020 Rule should at least require the Federal agency and certifying authority to collaborate and agree on the reasonable period of time. Some certifying authorities also pointed out that short reasonable periods of time (*e.g.*, 60 days) do not allow the state or tribe sufficient time to fulfill certain state or tribal law requirements, such as public notice requirements, or allow them to obtain all the information they need about a project to make an informed certification decision. As a result, these certifying authorities asserted that for complex projects, their only realistic options are to waive or deny certification. EPA expressed similar concerns in its notice of intent to revise the 2020 Rule. *See* 86 FR 29543 (June 2, 2021) ("Among other issues, EPA is concerned that the rule does not allow state and tribal authorities a sufficient role in setting the timeline for reviewing certification requests . . . .").

This proposed rulemaking not only affirms and clarifies that—consistent with the statutory text—the reasonable period of time may not exceed one year from receipt of the certification request, but it also proposes that the Federal agency and certifying authority collaboratively set the reasonable period of time on a project-by-project or project type basis

[37] *But see* U.S. EPA and Department of the Army, Clean Water Act Section 401 Certification Implementation Memorandum (August 19, 2021) (interim joint guidance from EPA and Army Corps extending the reasonable period of time to the full statutory year for certain nationwide permits).

(*e.g.*, through development of procedures and agreements), provided that it does not exceed one year. Under this proposal, if the Federal agency and certifying authority do not agree upon a reasonable period of time, the default reasonable period of time would be 60 days from the receipt of the request for certification. The proposed rulemaking also allows for extensions of the reasonable period of time under certain circumstances. Additionally, the Agency is proposing to remove as unnecessary the definition for "reasonable period of time," currently located at § 121.1(l). Like that definition, the proposed language in § 121.6(b) itself provides that the reasonable period of time is the time during which the certifying authority must act on a request for certification. As a result, the Agency finds it duplicative and unnecessary to include a separate definition for the term "reasonable period of time."

EPA understands that, in most cases, acting within the reasonable period of time is not a major issue for most certifying authorities. Several stakeholders noted in pre-proposal input that the majority of section 401 certifications are issued in well under a year. *See* Economic Analysis for the Proposed Rule (based on pre-proposal input and website information, most states issue certification decisions in 60-90 days)*;* s*ee also* 85 FR 42215 (July 13, 2020) ("EPA acknowledges that [] many certifications reflect an appropriately limited interpretation of the purpose and scope of section 401 and are issued without controversy… .").

However, a too short or inflexible reasonable period of time can present a major issue in certain circumstances, *e.g.*, for complex, multi-jurisdictional projects, and in jurisdictions with longer public notice requirements. In pre-proposal input, several certifying authorities said they needed more (rather than less) time to make certification decisions due to a lack of necessary information from project proponents. *See also* Economic Analysis for the Proposed Rule (noting that some pre-proposal input revealed that project size, project complexity, sufficiency of project proponent information, and public notice processes impacted whether additional time was necessary). Several stakeholders recommended that EPA establish a default reasonable period of time of one full year.

The collaborative approach EPA is proposing (*i.e.*, the Federal agency and certifying authority jointly set the reasonable period of time with a default of 60 days if an agreement is not reached) differs from the approach in both the 1971 Rule and the 2020 Rule where the reasonable period of time is determined by the Federal agency. *See* 40 CFR 121.16(b) (2019) and 40 CFR 121.6(a). Such an approach is not compelled by the statutory text because CWA section 401(a)(1) is silent regarding who, if anyone, determines the reasonable period of time. Nor does it say that the Federal agency is the only entity that may establish the reasonable period of time. Given that statutory ambiguity, EPA has flexibility under *Chevron* to establish regulatory provisions regarding the establishment of a reasonable period of time. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

EPA is proposing to provide Federal agencies and certifying authorities with an opportunity to collaboratively set the reasonable period of time, in lieu of relying on a regulatory default of 60 days. Under this approach, Federal agencies and certifying authorities can offer each other their expertise relevant to determining what period of time is reasonable. Federal agencies are in the best position to opine on timing in relation to their Federal licensing or permitting process. Likewise, because certifying authorities regularly issue their own permits for activities that may impact water quality (*e.g.*, NPDES permits, above and below ground pipelines, etc.) they also have expertise in the time needed to evaluate potential water quality impacts from federally licensed or permitted activities. Certifying authorities are also best positioned to opine on the impacts of state or tribal law governing the timing of decisions with respect to environmental review and public participation requirements.[38] Given that EPA is

[38] Section 401(a)(1) requires a State or interstate agency to establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. However, section 401(a)(1) itself does not set any requirements or time limits on those public notice procedures or how those procedures should be considered when setting the reasonable period of time. EPA is aware that some certifying authorities have public notice procedures that exceed the default reasonable period of time in place for some Federal agencies (*e.g.*, longer than the Corps or EPA's default 60-day reasonable period of time for federally issued CWA section 404 and 402 permits).

proposing to defer to the combined expertise of the Federal agencies and certifying authorities for establishing the reasonable period of time, this proposal does not retain the list of factors that a Federal agency shall consider, under the 2020 Rule at § 121.6(c), when establishing the reasonable period of time. Above all, this proposed approach addresses state and tribal stakeholders' concerns that, under the 2020 Rule, certifying authorities do not have enough influence in determining the length of the reasonable period of time for a particular project.

Under the proposed approach, during the first 30 days after a certifying authority receives a request for certification, the Federal agency and certifying authority would attempt to agree in writing to the length of a reasonable period of time. EPA recommends that the Federal agency and the certifying authority discuss the length of a reasonable period of time at the pre-filing meeting, particularly because the project proponent participates in that meeting and will, therefore, be informed of any reasonable period of time related discussions and decisions. Although the Agency is not proposing to list factors that Federal agencies and certifying authorities must consider when establishing the reasonable period of time, EPA observes that Federal agencies and certifying authorities might consider various factors, such as project type, complexity, location, and scale; the certifying authority's administrative procedures; and the potential for the licensed or permitted activity to affect water quality. Federal agencies and certifying authorities might also elect to establish joint reasonable period of time procedures and agreements through a memorandum of agreement (MOA). Such MOAs could apply to all potential projects or only to projects of a specified type. As discussed further below, such MOAs could also address how and when the agencies might change or extend the reasonable period of time. Alternatively, Federal agencies and certifying authorities might prefer to establish the reasonable period of time on a project-by-project basis. Whichever approach is taken to establish the reasonable period of time, the certifying authority must inform the Federal agency of the date of receipt of a certification request that meets the certifying authority's applicable submission procedures to signal the start of the reasonable period of time clock. *See* proposed §§ 121.5(d),

121.6(a).

As discussed above, if the agencies do not agree on the length of a reasonable period of time within 30 days of receipt of a request for certification, the default reasonable period of time would apply. *See* proposed § 121.6(c) This default approach obviates the need for a dispute resolution process in the event the certifying authority and Federal agency are not able to agree on the reasonable period of time.

EPA believes that a default reasonable period of time of 60 days is a sensible and practical interpretation of the reasonable period of time concept. First, the approach is responsive to stakeholder concerns regarding the 2020 Rule's approach. In pre-proposal outreach, several stakeholders indicated that most delays in the certification process were attributed to lack of information. As discussed in section V.C in this preamble, EPA is proposing that all requests for certification must include a copy of the draft license or permit and any existing and readily available data or information related to potential water quality impacts from the proposed project and provides certifying authorities with the opportunity to define what additional information is needed in a certification request. These components of the proposal would allow certifying authorities to define what information is necessary to initiate a successful certification review process and, thus, address lack of information concerns before the reasonable period of time begins.

It bears noting that the statutory language does not guarantee that the reasonable period of time is one year in all instances. Rather, section 401(a)(1) provides that the reasonable period of time "shall not exceed one year." 33 U.S.C. 1341(a)(1). The words "shall not exceed" imply that the reasonable period of time need not be one full year and that a certifying authority should not—in all circumstances—expect to be able to take a full year to act on a section 401 certification request. Under the proposal, the certifying authority could be subject to a shorter than one-year period of time to render its decision, provided that the Federal agency and the certifying authority have agreed to a shorter time, or as discussed above, the agencies rely on the

default reasonable period of time. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) ("[W]hile a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year."). Additionally, the Agency's longstanding 1971 regulations acknowledged that the reasonable period of time may be less than one year. *See* 40 CFR 121.16(b) (2019) (noting that the reasonable period of time is generally six months).

Based on the Agency's nearly 40 years of experience with NPDES permits, the Agency views a 60-day default reasonable period of time as appropriate, provided (as the proposed rule would require) that the reasonable period of time does not commence until after the Federal licensing or permitting agency prepares a draft license or permit. *See* 40 CFR 124.53(c)(3) (providing a default 60-day reasonable period of time for certification on draft NPDES permits). In the NPDES permitting process, draft permits include detailed fact sheets or statements of how permit limits and conditions were developed along with legal and/or scientific justifications, giving certifying authorities relevant data and information to use in their certification process and decision. A default 60-day reasonable period of time is also used for certification requests on section 404 general permits, which occurs after the Corps prepares the draft permit. *See* 33 CFR 325.2(b)(1)(ii).

EPA requests comment on this proposed collaborative approach to setting the reasonable period of time, the 30-day timeframe that the Federal agency and certifying authority would have to determine the length of the reasonable period of time, and the 60-day default. The Agency also requests comments on alternative approaches, such as retaining the approach where the Federal agency is solely responsible for determining the reasonable period of time. Another alternative approach EPA seeks comment on is whether the default reasonable period of time should be shorter or longer depending on when certification is requested during the licensing or permitting process. For example, if EPA were to decide that a draft license or permit is not a required component of a certification request, should EPA's regulations specify a different and potentially longer default reasonable period of time? Additionally, the Agency is soliciting comment on

whether and why the default reasonable period of time should be longer than 60 days (*e.g.*, 120 days, six months, one year). The Agency also requests any information, data, or experiences stakeholders can provide on the length of time it has taken or should take a certifying authority to act on a request for certification.

2. Extensions to the Reasonable Period of Time

The proposed rule provides that the reasonable period of time may be extended upon written agreement by the certifying authority and Federal agency, in consultation with the project proponent. Any extensions shall not exceed one year from the receipt of the certification request. Project proponents would be consulted before any changes to the reasonable period of time, but they would not have the ability to veto final reasonable period of time decisions jointly made by the certifying authority and Federal agency. The statute does not explicitly address extending the reasonable period of time once it has started; nor does it expressly prohibit extending the reasonable period of time as long as the certifying authority "acts" within one year from receipt of the certification request. The statute also does not specify who may extend the reasonable period of time or the terms on which it may be extended.

The 1971 Rule was also silent on reasonable period of time extensions. However, several Federal agencies, including EPA and the Corps, established regulations allowing extensions to their default reasonable periods of time. *See* 40 CFR 124.53(c) (allowing for a reasonable period of time greater than 60 days for certification requests on NPDES permits where the EPA Regional Administrator finds "unusual circumstances"); 33 CFR 325.2(b)(1)(ii) (allowing for a reasonable period of time greater than 60 days for certification requests on Corps permits when the "district engineer determines a shorter or longer period is reasonable for the state to act.").

The 2020 Rule explicitly allows certifying authorities to request an extension of the reasonable period of time. 40 CFR 121.6(d). However, only the Federal agency has the power to extend the reasonable period of time, and such extension cannot exceed one year from the receipt of the certification request. *Id.*; *see also* 85 FR 42260 (July 13, 2020). Under the 2020 Rule, the

Federal agency is not required to grant reasonable period of time extension requests. *See* 40 CFR 121.6(d)(2). As a result, Federal agencies may deny those requests even in situations where the certifying authority said it was not able to act within the established timeframe (*e.g.*, where state public notice procedures required more time than the regulatory reasonable period of time). In pre-proposal input, at least one stakeholder observed that a Federal agency's failure to grant an extension request could lead to certification denials. Other stakeholders noted that certifying authorities should have a say in any extensions of the reasonable period of time.

The proposed requirement to include a copy of the draft license or permit (and any existing and readily available data or information related to potential water quality impacts from the proposed project) in the request for certification, and the opportunity to collaboratively set the reasonable period of time, should reduce the need for extensions. However, the Agency recognizes there may be circumstances where the established or default reasonable period of time are not sufficient to allow the certifying authority to complete its review. Accordingly, the Agency is proposing to allow certifying authorities and Federal agencies to jointly extend the reasonable period of time in a written agreement, as long as the project proponent is consulted and the extension does not exceed one year from the receipt of request for certification. *See* proposed § 121.6(d). Consistent with this proposed collaborative approach, the Agency is not proposing to retain the regulatory text located at § 121.6(d) that permits Federal agencies to unilaterally determine whether to extend the reasonable period of time. This proposal does not preclude a Federal licensing or permitting agency from extending the reasonable period of time after a certification has been issued, as long as the extension will not exceed one year from receipt of the request for certification.[39]

[39] For example, a certifying authority may submit a new or revised certification decision after it acts on a certification request if the reasonable period of time has not expired and the Federal licensing or permitting agency agrees. *See* U.S. EPA and Department of the Army, Clean Water Act Section 401 Certification Implementation Memorandum (August 19, 2021). In contrast to the certification modification proposed at § 121.10, a new certification decision made within the reasonable period of time will supersede the previous certification decision.

The Agency expects that certifying authorities and Federal agencies will collaboratively agree to extensions to the reasonable period of time where needed. For example, the certifying authority and Federal agency could develop in a MOA a process to identify scenarios where changes to the reasonable period of time would be appropriate. Such scenarios may include situations where relevant new information becomes available during the reasonable period of time. EPA notes that the proposed rulemaking promotes early collaboration and pre-filing meetings to allow the Federal agency, certifying authority, and the project proponent to discuss project complexity, seasonal limitations, and other factors that may influence the time needed to complete the certification review. These opportunities may reduce the need to extend the jointly established or default reasonable period of time.

However, the Agency also recognizes that there are circumstances under which the Federal agency *should* extend the reasonable period of time without the certifying authority needing to negotiate an agreement. Such situations, which were not included in the 2020 Rule, include where a certification decision cannot be rendered within the reasonable period of time due to force majeure events (including, but not limited to, government closure or natural disasters). Extensions may also be necessary in jurisdictions where the state or tribal public notice and comment process takes longer than the negotiated or default reasonable period of time. To address pre-proposal input, in contrast to the 2020 Rule, the Agency is proposing to identify a limited list of scenarios that would require the extension of the reasonable period of time. *See* proposed § 121.6(c). If a longer period of time to review the request for certification is necessary due to these circumstances, upon notification by the certifying authority prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the period of time necessitated by public notice requirements or the force majeure event. In its notification, the certifying authority must provide the Federal agency with a written justification for an extension. Ultimately, such extension may not exceed one year from receipt of the request for certification. The justification would describe the circumstances supporting the extension

(*i.e.*, accommodating the certifying authority's public notice requirements, government closures, or natural disasters) and does not require Federal agency approval before taking effect. For example, if the reasonable period of time is set to the default 60 days and the certifying authority has a 90-day public notice requirement, then the certifying authority would provide a written justification to the Federal agency prior to the end of the reasonable period of time for an extension to accommodate the public notice requirement. The extended reasonable period of time would take effect upon notification by the certifying authority to the Federal agency.

The proposed approach balances Federal agency and certifying authority equities better than the 1971 Rule and the 2020 Rule by allowing the Federal agency and certifying authority to determine collaboratively whether and how the reasonable period of time should be extended. This approach to extensions aligns with the approach proposed above for joint establishment of the reasonable period of time. It also aligns with cooperative federalism principles central to the CWA. Moreover, it encourages stakeholder cooperation and allows for input from the project proponent. EPA is soliciting comment on this proposed approach. The Agency is also seeking comment on the list of situations described in the regulatory text under which extensions would be automatic, for example, whether other circumstances should be expressly included. Additionally, the Agency seeks comment on any alternative approaches, such as only allowing the Federal licensing or permitting agency to determine any extensions of the reasonable period of time, not requiring the project proponent to be consulted before an extension decision, or not allowing any extensions of the reasonable period of time after the agreed to or default reasonable period of time has been established.

Consistent with this proposal, the Agency is also proposing to delete the part 124 provisions regarding the reasonable period of time for certification on EPA-issued NPDES permits, currently located at 40 CFR 124.53(c)(3), in favor of the reasonable period of time provisions in proposed § 121.6. The approach to the reasonable period of time taken in § 124.53(c) is not fully consistent with the approach proposed at § 121.6. For instance, unlike

proposed § 121.6(b), § 124.53(c)(3) does not involve certifying authority collaboration in setting the reasonable period of time. And unlike proposed § 121.6(c), § 124.53(c)(3) does not allow for automatic extensions to accommodate a certifying authority's public notice requirements or force majeure events (instead allowing extensions beyond the default 60 days only if EPA finds "unusual circumstances" require a longer time).

3. Withdrawal and Resubmissions of Requests for Certification

EPA is aware that, historically under the 1971 Rule, certifying authorities asked project proponents to withdraw and resubmit their certification requests in order to restart the clock and provide more time to complete their certification review. EPA is also aware that this practice has been subject to Federal court litigation. In this proposed rule, EPA is not taking a position on the legality of withdrawing and resubmitting a certification request. While there may be situations where withdrawing and resubmitting a certification request is appropriate, drawing a bright regulatory line on this issue is challenging, and the law in this area is dynamic. *See Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (holding that a repeated, coordinated withdrawal and resubmittal of a certification request resulted in a waiver); *N.C. Dep't of Envtl. Quality (NCDEQ) v. FERC*, 3 F.4th 655, 676 (4th Cir. 2021) (finding that the record did not support FERC's determination that the state and project proponent withdrew and resubmitted the certification request in a coordinated fashion). For these reasons, the proposed rulemaking does not take a position on this issue, instead allowing the courts and the different state and tribal certifying authorities to make case-specific decisions or issue their own regulations addressing the practice.

Neither section 401 nor the 1971 Rule specifically address the practice of withdrawing a certification request and submitting a new request to restart the reasonable period of time. On the other hand, the 2020 Rule prohibits the certifying authority from asking the project proponent to withdraw the certification request to reset the reasonable period of time. 40 CFR 121.6(e). In support of that position, the 2020 Rule relies on a broad reading of the D.C. Circuit's decision in

Hoopa Valley Tribe and asserts that the regulatory text at § 121.6(e) is a "clear statement that reflects the plain language of section 401 and. . . is supported by the legislative history." 85 FR 42261. In that case, which featured highly unusual facts,[40] the court rejected the particular "withdraw and resubmit"[41] strategy the project proponents and states had used to avoid waiver of certification for a FERC license. 913 F.3d at 1105. The court held that a decade-long "scheme" to subvert the one-year review period characterized by a formal agreement between the certifying authority and the project proponent, whereby the project proponent never even submitted a new request, was inconsistent with the statute's one-year deadline. *Id*. Significantly, the court said it was not addressing the legitimacy of a project proponent actually withdrawing its request and then submitting a new one, or how different a new request had to be to restart the one-year clock. *Id*. at 1104.

On the other hand, at least two circuit courts have acknowledged the possibility that withdrawal and resubmittal of a certification request may be a viable mechanism for addressing complex certification situations. *See NCDEQ*, 3 F.4th at 676 (withdrawal and resubmittal appropriate where the certifying authority and project proponent did not engage in a coordinated scheme to evade the reasonable period of time); *NYSDEC*, 884 F. 3d at 456 (noting in dicta that the state could "request that the applicant withdraw and resubmit the application"). Additionally, EPA's guidance prior to the 2020 Rule acknowledged use of the withdrawal and resubmittal approach, as well as the "deny certification without prejudice to refile" approach but noted that

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[40] The court held that the project proponent and the certifying authorities (California and Oregon) had improperly entered into an agreement whereby the "very same" request for state certification of its relicensing application was automatically withdrawn and resubmitted every year for a decade by operation of "the same one-page letter," submitted to the states before the statute's one-year waiver deadline. 913 F.3d at 1104.

[41] Historically, certifying authorities and project proponents have used the "withdraw and resubmit" approach for dealing with the one-year deadline for complex projects. There are a multitude of permutations, but the basic idea is that the project proponent would withdraw the certification request and then resubmit a new certification request either immediately or at some later date. The Agency recognizes that there may be legitimate reasons for withdrawing and resubmitting certification requests, including but not limited to the following: a new project proponent, project analyses are delayed, or the project becomes temporarily infeasible due to financing or market conditions.

"[t]his handbook does not endorse either of the two approaches…." 2010 Handbook, at 13, n.7 (rescinded).

During pre-proposal input, many state and tribal stakeholders said they did not support the 2020 Rule's position on the withdrawal and resubmittal process. These stakeholders called for more flexibility in the case of unexpected and significant changes in the project. For the reasons discussed below, EPA is not proposing to retain the regulatory text at § 121.6(e) and instead, proposing not to take a position in this rulemaking on the permissibility of withdrawing and resubmitting a certification request.

As mentioned above, neither the text of section 401 nor *Hoopa Valley Tribe* categorically precludes withdrawal and resubmission of a certification. EPA understands the concern expressed by the D.C. Circuit in *Hoopa Valley Tribe* that prolonged withdrawal and resubmission "schemes" might—under certain facts—unreasonably delay and frustrate the Federal licensing and permitting process. Yet, the potential factual situations that might give rise to, and potentially justify, withdrawal and resubmission of a certification request are so varied that the Agency is not confident that it can create regulatory "bright lines" that adequately and fairly address each situation. By not taking a regulatory position on this issue, certifying authorities are free to determine on a case-by-case basis whether and when withdrawal and resubmittal of a certification request is appropriate. Such determinations are ultimately subject to judicial review based on their individual facts. The Agency seeks comment on this approach, as well as any alternative approaches, such as EPA establishing regulations specifically authorizing withdrawals and resubmissions in certain factual situations similar (or not) to the circumstances in *Hoopa Valley Tribe*.

D. Scope of Certification

The Agency is proposing to return to the scope of certification standard affirmed by the Supreme Court in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). In that case, the Court held that section 401 "is most reasonably read" as authorizing the

certifying authority to evaluate and place conditions on what the Court described as the "project in general" or the "activity as a whole" to assure compliance with various provisions of the Clean Water Act and "any other appropriate requirement of State law" once the predicate existence of a discharge is satisfied. *Id.* at 711-12. The 2020 Rule substantially narrowed the scope of a certifying authority's review of a federally licensed or permitted project. Before the 2020 Rule, a certifying authority could consider whether the federally licensed or permitted "activity as a whole" might adversely affect the quality of the state's or tribe's waters. After the 2020 Rule became effective, the certifying authority could only consider potential water quality impacts from the project's point source "discharges." *See* 85 FR 42229 (July 13, 2020). This change was heavily criticized by many states, tribes, and non-governmental organizations as unlawfully narrowing the certifying authorities' scope of review under section 401. In recognition of, and deference to, the central role that states and tribes play in issuing CWA section 401 certifications, EPA is proposing to modify the regulatory text at § 121.3 and reaffirm the broader and more environmentally protective "activity as a whole" scope of review that the Supreme Court affirmed in *PUD No. 1*.

The distinction and choice between "discharge-only" and "activity as a whole" is more than semantic and has significant environmental consequences. The "activity as a whole" approach allows states and tribes to holistically consider and protect against impacts to their water resources from the licensed or permitted "project in general." *Id.* at 711. For example, stakeholders have commented that a "discharge-only" approach would inappropriately constrain the scope of review and conditions relating to hydroelectric dam facilities. Specifically, stakeholders stated that addressing the water quality impacts of a dam requires a broader review of potential effects beyond those caused only by the discharge(s) from a dam's powerhouse or tailrace. This is because the chemical, physical, and biological integrity of a river is fundamentally altered by the federally licensed "activity" or "project"—not just the discharges from a specific element, *e.g.*, the powerhouse or tailrace. They noted that a dam alters the

chemical, physical, and biological integrity of a river by placing a barrier across it, blocking upstream and downstream passage of nutrients and aquatic species, altering the timing and volume of flows, transforming a free-flowing riverine reach into a reservoir, and converting the energy that oxygenates water into electricity.

Stakeholders have asserted that a "discharge-only" approach to a hydroelectric dam facility precludes several kinds of potential non-discharge-related conditions a certifying authority might add to its water quality certification, including fish and eel passage facilities (upstream and downstream), fish protection measures concerning intakes, wildlife habitat enhancements, and aquatic resource enhancements. Stakeholders also noted that FERC-licensed hydropower projects can also limit public access to a river, adversely affecting fishing, swimming, boating, and other state-adopted and EPA-approved recreational designated uses. Conditions assuring protection of those designated uses would arguably not be allowed if the scope of review is limited only to impacts from the dam's "discharges."

EPA is concerned that many (if not all) of these water quality-related impacts and potential conditions might fall outside the scope of certifying authority review under the 2020 Rule's "discharge-only" approach to scope of review. The inability of states and tribes to protect against such impacts could seriously impair their ability to protect valuable water resources. This would be inconsistent with Congress's intention to provide states and tribes with this powerful certification tool to prevent their water resources from being adversely impacted by projects needing Federal licenses or permits.

In addition to narrowing the scope of review from "activity as a whole" to "discharge," the 2020 Rule also significantly narrows the ability of certifying authorities, pursuant to section 401(d), to include conditions in their certifications to protect the quality of their waters. Before the 2020 Rule, consistent with EPA's proposed interpretation of the statute, a certifying authority could add conditions to its certification as necessary to assure compliance with the specifically enumerated sections of the CWA and "any other appropriate requirement of State [or Tribal]

law." 33 U.S.C. 1341(d). In the 2020 Rule, however, EPA codified a narrow regulatory interpretation of the section 401(d) term "other appropriate requirements of State law." 85 FR 42250 (July 13, 2020). With the 2020 Rule in effect, the certifying authority can only add conditions necessary to assure compliance with those specifically enumerated sections of the CWA "and state or tribal regulatory requirements for *point source discharges* into waters of the United States." 40 CFR 121.1(n), 121.3. In recognition of, and deference to, the central role that states and tribes play in issuing CWA section 401 certifications, EPA is proposing to return to what it now views as the more textually accurate and environmentally protective "any other appropriate requirement of State [or Tribal] law" standard for including certification conditions.

As discussed below, the interpretations of section 401's scope of review and conditions EPA is proposing are more closely aligned with the statutory text and goals of section 401 than the interpretations in the 2020 Rule. Consistent with the principles of cooperative federalism that underlie the Clean Water Act and especially section 401, the interpretations the Agency is proposing would restore the full measure of authority that EPA believes Congress intended to grant states and authorized tribes to protect their critical water resources.

The following sections discuss (1) EPA's longstanding position that CWA section 401 certifications are limited to addressing water quality effects; (2) EPA's decision to reaffirm the Supreme Court's interpretation of the scope of certification in *PUD No. 1* as the "activity as a whole;" and (3) EPA's decision to return to a broader definition of "water quality requirements" than that adopted in the 2020 Rule.

1. Water Quality Impacts from Federally Licensed or Permitted Projects

The Agency continues to interpret section 401 to provide that, when issuing certifications and conditions, certifying authorities may only consider and address potential water quality effects. The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Among the Act's policy declarations is "the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to

prevent, reduce, and eliminate pollution." *Id*. at 1251(b). As discussed in section IV.A in this preamble, Congress intended that section 401 provide states and tribes with a powerful tool to prevent their water resources from being adversely impacted by projects needing Federal licenses or permits. While the text of section 401 does not expressly state that certifications and conditions may only consider and address water quality effects, the courts have consistently clarified that this is so. *See Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."); *see also PUD No. 1,* 511 U.S. at 711–713 (holding that a state's authority to impose conditions under section 401(d) "is not unbounded"). This view is also consistent with prior Agency interpretations articulated in the 2020 Rule and prior Agency guidance. *See* 85 FR 42250 ("The scope of a Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements."); 2010 Handbook, at 16 (rescinded) ("As incorporated into the 1972 CWA, [section] 401 water quality certification was intended to ensure that no federal license or permits would be issued that would prevent states or tribes from achieving their water quality goals or that would violate CWA provisions.").

Accordingly, EPA continues to maintain that it would be inconsistent with the purpose of CWA section 401 to deny or condition a section 401 certification based solely on potential air quality, traffic, noise, or economic impacts that have no connection to water quality. In pre-proposal outreach, it appeared that some stakeholders were confused about whether an EPA proposal to align the scope of review with *PUD No.1* would allow certifying authorities to deny or condition certifications based on potential environmental or societal impacts not related to water quality. It is not the Agency's intention to do so or to include consideration of such non-water quality-related impacts within the proposed "activity as a whole" scope of review.

The preamble to the final 2020 Rule identified examples of certification conditions possibly falling outside the water quality-related scope of section 401 review because they did

not address water quality impacts, including one-time and recurring payments to state agencies for improvements or enhancements that are unrelated to the proposed federally licensed or permitted project; conditions to address potential non-water quality-related environmental impacts from the creation, manufacture, or subsequent use of products generated by a proposed federally licensed or permitted activity or project; and conditions related only to non-water quality-related impacts associated with air emissions and transportation effects. *See* 85 FR 42230. Subject to a case-by-case review of the particular facts presented by each certification, EPA thinks it reasonable to assume that such non-water quality-related conditions would generally be beyond the scope of section 401.

On the other hand, some conditions that stakeholders have identified as potentially problematic may, in fact, be appropriate as necessary to prevent adverse impacts to a state's or tribe's water quality. Depending on the circumstances, examples of conditions that might be appropriate to include in a state or tribal certification to comply with water quality requirements could be: building and maintaining fish passages (related to protecting designated uses); the construction of public access for fishing (related to protecting recreational/fish consumption designated uses); maintaining minimum flow rates for visual, auditory, and religious experiences (related to protecting designated uses); compensatory wetland and riparian mitigation (related to protecting designated uses and criteria); temporal restrictions on activities to protect sensitive aquatic species (related to protecting designated uses); pre-construction monitoring and assessment of resources (related to protecting designated uses and criteria); habitat restoration (related to protecting designated uses and criteria); construction of recreation facilities to support designated uses (*e.g.*, whitewater release for kayakers, canoe portages, parking spaces) (related to protecting designated uses); tree planting along waterways (related to protecting designated uses and criteria); and spill management and stormwater management plans (related to protecting designated uses and criteria). For these and other potentially qualifying conditions, EPA believes that it is appropriate for the certifying authority to consider the broadest possible range of water

quality effects and that the appropriateness of any given condition will depend on an analysis of all relevant facts.

The Agency invites comment on to what extent section 401 certification review and conditions should be limited to potential water quality-related effects or should also consider non-water quality-related impacts.

2. "Activity as a Whole"

EPA is proposing to return to the "activity as a whole" or "project in general" scope of certification review and conditions that the Supreme Court affirmed in *PUD No. 1.* Having carefully reviewed the 2020 Rule in light of pre-proposal stakeholder comments, EPA has determined that the "activity as a whole" interpretation of scope is more consistent with the statutory text, legislative history, and water quality protective goals of the CWA than the 2020 Rule's "discharge-only" approach. The Agency also finds that the more environmentally protective "activity as a whole" interpretation of scope is better aligned with the cooperative federalism principles animating section 401.

The first sentence of section 401(a)(1) provides that a certification must be obtained by "*any applicant* for a Federal license or permit to conduct *any activity* … which may result in *any discharge* into the navigable waters." 33 U.S.C. 1341(a)(1) (emphasis added). These three italicized words—"applicant," "activity," and "discharge"—are the semantic building blocks used to support two differing interpretations of scope of review. Supporters of the "discharge-only" interpretation of scope of review chiefly rely on Congress's use of the word "discharge" in section 401(a)(1) in support of the proposition that states and tribes may only consider water quality impacts from the project's discharges when deciding whether to certify or add conditions to federally licensed or permitted projects. EPA disagrees with this overly narrow interpretation.

Following its reconsideration of the statutory text, the Agency believes that Congress's use of the words "applicant", "activity", and "discharge" in section 401(a)(1), "applicant" in section 401(d), and its failure to use the word "discharge" in section 401(d), create enough

ambiguity to support an interpretation that certifying authority review, and the ability to impose conditions, extends to the project proponent's "activity as a whole," or in other words, the "project in general." In the 2020 Rule, EPA acknowledged that the statutory language addressing scope of review is ambiguous and subject to interpretation. *See* 85 FR 42232. In light of that ambiguity, EPA now agrees with the Supreme Court in *PUD No. 1* that "activity as a whole" is "a reasonable interpretation of [section] 401." *PUD No. 1*, 511 U.S. at 712.[42]

In *PUD No. 1*, the Supreme Court reviewed a water quality certification issued by the State of Washington for a new hydroelectric project on the Dosewallips River. The principal dispute adjudicated in *PUD No. 1* was whether a certifying authority may require a minimum stream flow as a condition in a certification issued under section 401. The project applicant identified two potential discharges from its proposed hydroelectric facility: "the release of dredged and fill material during construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity." *Id*. at 711. The project applicant argued that the minimum stream flow condition was unrelated to these discharges and therefore beyond the scope of the state's authority under section 401. *Id*.

The Court examined sections 401(a)(1) and 401(d), specifically the use of different terms in those sections of the statute to inform the scope of a section 401 certification. Section 401(a)(1) requires the certifying authority to certify that the discharge from a proposed federally licensed or permitted project will comply with certain enumerated CWA provisions, and section 401(d) authorizes the certifying authority to include conditions to assure that the applicant will comply with those enumerated CWA provisions and "'any other appropriate' state law requirements." *Id*. at 700. Emphasizing that the text of section 401(d) "refers to the compliance of the applicant, not the discharge," the Court concluded that section 401(d) "is most reasonably

[42] The dissent in *PUD No. 1* offered a more limited interpretation of section 401(d)'s scope, stating that "while [section] 401(d) permits a State to place conditions on a certification to ensure compliance of the 'applicant,' those conditions must still be related to discharges." 511 U.S. at 727 (Thomas, J., dissenting with whom Scalia, J., joined).

read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id.* at 712.[43] The Court recognized that section 401 placed some bounds on the "activity as a whole" scope, noting that a certifying authority "can only ensure that the project complies with 'any applicable effluent limitations or other limitations under [33 U.S.C. 1311, 1312] or other provisions of the Act,[']' 'and with any other appropriate requirement of State law.'" 511 U.S. at 712. The Court found that "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to [section] 303,"—the limitations at issue in *PUD No. 1*—"are 'appropriate' requirements of state law," but declined "to speculate on what additional state laws, if any, might be incorporated by this language." *Id*. at 713.

A quarter of a century after *PUD No. 1,* in its 2020 Rule EPA rejected its longstanding "activity as a whole" interpretation, affirmed by the *PUD No. 1* majority, in favor of the dissent's "discharge-only" interpretation of section 401's scope. The 2020 Rule's interpretation received heavy criticism and was subject to multiple legal challenges. Having now carefully reconsidered the "discharge-only" interpretation of scope of review the previous Administration announced in the 2020 Rule, EPA has concluded that the statutory text, legislative history, and goals of section 401 more reasonably support the "activity as a whole" standard that was accepted practice for the preceding 50 years.

Congress's 1972 textual revisions to section 21(b) support the "activity as a whole" interpretation of scope. At the same time it was revising section 401(a)(1), Congress added section 401(d) that required states to include conditions "necessary to assure" that "any applicant" will comply with sections 301, 302, 303, 306 and 307 and "any other appropriate requirement of State law."[44] Unlike section 401(a)(1), section 401(d) does not use the term "discharge." Use of the word "applicant" instead of "discharge" in section 401(d) introduced

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[43] Without acknowledging that the 1971 Rule was based on an earlier version of the statute, the Court also noted that its interpretation was consistent with EPA's 1971 Rule. *Id*. at 712.
[44] Public Law 92-500, 401, 85 Stat. 816 (1972).

ambiguity as to whether the scope of section 401 review was limited to effects from the discharge alone. In light of this ambiguity, EPA believes it is reasonable to interpret the combined text of sections 401(a)(1) and 401(d) as supporting "activity as a whole" as the proper scope of certification. 511 U.S. at 711-712. ("[Section] 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the existence of the threshold condition, existence of a discharge, is satisfied."). Because section 401(d) requires that a section 401(a) certification include conditions "necessary to assure" the applicant's compliance with the five CWA sections listed in section 401(a)(1) and "any other appropriate requirement of State law," section 401(d) is most reasonably read to require the certifying authority—when it reviews a certification request under section 401(a)(1)—to review the potential water quality impacts from the "project in general," i.e, the "activity as a whole," and not merely evaluate the water quality effects of the potential discharge. This approach is reasonable because it accounts for the fact that the applicant for certification is responsible for a wide variety of activities at the project site that might affect water quality in addition to any potential "discharge." To assure—as it must under section 401(d)—that "the applicant" complies with all applicable state or tribal and Federal water quality requirements, the certifying authority must be able to evaluate potential water quality effects from the applicant's "activity as a whole."[45]

The text of CWA sections 401(a)(3)-(5) also supports an "activity as a whole" interpretation of section 401's scope. Section 401(a)(3) provides that a certification for a facility's *construction* fulfills the section 401 obligations with respect to its operation unless the

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[45] *PUD No. 1* also said its "activity as a whole" interpretation was consistent with EPA's 1971 Rule at 40 CFR 121.2(a)(3) (2019) (requiring reasonable assurance that the "activity" will not violate applicable water quality standards) and with EPA's 1989 Guidance. It is worth noting, however, that EPA's 1971 Rule pre-dated the 1972 amendments and was based on the language of the 1970 version of the statute which used the word "activity" instead of "discharge." While the Court appeared to be unaware of that fact, it is of minor significance because EPA's conclusion that "activity as a whole" is the most reasonable interpretation is based on the statutory text and legislative history, not EPA's regulations preceding enactment of the 1972 law.

certifying authority determines there is no longer reasonable assurance of compliance with sections 301, 302, 303, 306 and 307 because of changes in "(A) the construction and operation of the facility." *See* 33 U.S.C. 1341(a)(3). "Construction and operation of the facility" is clearly a broader concept than "discharge." In addition, section 401(a)(4) guarantees that the certifying authority has the opportunity "to review the manner in which the [previously certified] facility or activity shall be operated or conducted" prior to its initial operation "for the purpose of assuring that applicable effluent limitations or other limitations or water quality requirements will not be violated." *See id*. at 1341(a)(4). If this review results in suspension of the facility's permit, the permit shall remain suspended until notification from the certifying authority that "there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316 and 1317." *Id.* Lastly, section 401(a)(5) provides that any certified Federal license or permit may be suspended or revoked by the Federal licensing or permitting agency "upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316 and 1317." *See id*. at 1341(a)(5). The scope of review employed in each of these subsections is whether there has been compliance by the "facility or activity" with the five CWA sections identified in section 401(a)(1), and not merely compliance by the "discharge." Congress's application of this "facility" and "activity" scope of review in sections 401(a)(3)-(5) is consistent with and supports an "activity as a whole" interpretation of sections 401(a)(1) and 401(d).

The legislative history of CWA section 401, and its predecessor section 21(b) of the Water Quality Improvement Act of 1970, also supports the "activity as a whole" interpretation of scope. EPA believes that the mere fact that Congress changed a single word "activity" to "discharge" in section 401(a)(1) of the 1972 Act is not dispositive, or even persuasive, that Congress intended to shrink the scope of review under sections 401(a)(1) and (d) from consideration of water quality effects caused by the "project in general" or "activity as a whole"

to those caused only by the discharge.

It is not obvious from the legislative history that such a significant shift was intended. It is, however, quite clear from the legislative history that, in 1972, Congress thought it was making only "minor," insubstantial changes to section 21(b). The Senate Report stated that section 401 was "substantially section 21(b) of the existing law." S. Rep. No. 92-414, at 69 (1971). *See also* remarks of Sen. Baker: "Section 21(b), with minor changes, appears as section 401 of the pending bill S.2770." 117 Cong. Rec. 38857 (1971). Nowhere in the legislative history is there a statement to the effect that Congress understood it was dramatically shrinking section 401's scope of review to only those water quality effects caused by a potential discharge. To the contrary, the House Report stated that "[i]t should be clearly noted that the certifications required by section 401 are *for activities* which may result in any discharge into navigable waters." H.R. Rep. 92-911, at 124 (1972) (emphasis added). Indeed, in summarizing section 401, Senator Muskie stated that "[a]ll we ask is that *activities* that threaten to pollute the environment be subjected to the examination of the environmental improvement agency of the State for an evaluation and recommendation before the federal license or permit be granted." 117 Cong. Rec. 38854 (1971) (emphasis added). *See also* H.R. Rep. 92-911, at 121 (1972) (stating that "[t]he term 'applicable' as used in section 401 . . . means that the requirement which the term 'applicable' refers to must be pertinent and apply to *the activity* and the requirements must be in existence by having been promulgated or implemented.") (emphasis added).

A comparison of section 21(b) and section 401 reveals that the two sections are, indeed, substantially the same. In light of the previously discussed legislative history affirming that the 1972 law was "substantially" the same as the 1970 law, EPA does not think it reasonable to assume that Congress intended to make fundamental changes to the scope of the certifying authority's certification review merely by changing a single word ("activity") in section 401(a) when—at the same time—it added a different and more expansive formulation based on the word "applicant" in section 401(d). *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468

(2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Congress's revisions to section 401(a) in the 1977 CWA amendments also suggests it continued to support the application of the broader "activity" approach. Legislative history from 1977 states that Congress intended for "[t]he inserting of section 303 into the series of sections listed in section 401 [] to mean that a federally licensed or permitted *activity*, including discharge permits under section 402, must be certified to comply with State water quality standards adopted under section 303." H.R. Rep. No. 95-830, at 96 (1977) (emphasis added).

The Agency invites comment on its proposal to readopt the "activity as a whole" definition of scope of review under section 401(a)(1) and scope of conditions under section 401(d). The Agency is also seeking comment on whether it should adopt the "discharge-only" scope of review announced in the 2020 Rule.

Consistent with the discussion above, the Agency is proposing to define the term "activity as a whole" to capture "any aspect of the project activity with the potential to affect water quality." *See* proposed § 121.1(a). This approach provides certifying authorities with the ability to consider any aspect of the federally licensed or permitted activity that may adversely impact water quality. As the stakeholder input described above illustrates, the impacts of a federally licensed or permitted project on a certifying authority's water resources may be caused by aspects of the project's activity in addition to the potential discharge that triggered the need to seek section 401 certification. Accordingly, the Agency's proposed definition for the term "activity as a whole" is meant to include all activity at the proponent's "project in general" with the potential to affect water quality (*e.g.*, construction and operation of the project or facility). This definition of "activity as a whole" is consistent with previously issued EPA guidance, which identified the scope of review as "all potential water quality impacts of the project, both direct and indirect, over the life of the project." *See* 1989 Guidance, at 22 ("[I]t is imperative for a State

review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project."); *see also* 2010 Handbook, at 17 (rescinded) ("Thus, it is important for the [section] 401 certification authority to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project.") (citing *PUD No.1*, 511 U.S. at 712 (1994)). The Agency invites comment on its proposed interpretation of the term "activity as a whole."

The Agency also understands that, while *PUD No. 1* used the term "activity as a whole," the Court did not offer a specific definition of that term, specifically what "activity" should be examined as a whole. Nevertheless, certifying authorities and Federal agencies have gained significant experience over nearly 50 years implementing an "activity as a whole" approach, and EPA believes that certifying authorities and Federal agencies are capable of appropriately delineating the "activity as a whole" or the "project in general" based on the facts of each situation. EPA is not aware of any cases in which delineation of "activity as a whole" has been litigated, provided that the scope of review was limited to water quality. While EPA intends the word "activity" in the term "activity as a whole" to include all activities of the "project in general" that might affect water quality, EPA invites comment on whether EPA should specifically define the term "activity" to mean only those activities at the project site that are specifically authorized by the Federal license or permit in question. EPA also invites comment on whether and how the Federal licensing or permitting agency could effectively implement a certification with conditions addressed to impacts from the "activity as a whole" if it has authority over only a small part of a larger project. What challenges would be presented to the licensing or permitting authority's ability to administer and enforce its license or permit?

To illustrate, assume there are two hydroelectric facilities on the same river. Facility A has yet to be constructed and may require multiple Federal licenses or permits. It may require a FERC license for its construction and operation, a CWA section 404 permit for dredge and fill activity related to its construction, and a CWA section 402 permit to discharge pollutants during

its operation. Facility B, on the other hand, has already been constructed and only needs a CWA section 402 permit to discharge pollutants before it may commence operations. EPA invites comment on whether the same "activity" viewed "as a whole" should define the scope of review applicable to certifications for both facilities.

With respect to the broad, relatively comprehensive licenses and permits issued by FERC and the Corps for construction and operation of Facility A, the Agency sees little difference in the scope of review and conditions that may be included in certifications issued under either a broad or potentially narrower approach to defining the relevant "activity." That is because their licenses and permits are generally comprehensive enough in what they authorize that there would appear to be few if any significant aspects of a project's activity that fall outside the scope of activities authorized by the Federal license or permit. Accordingly, for these kinds of licenses and permits, EPA believes that any significant potential water quality-related impacts could be addressed by a certification condition on the "activity" whether it is construed to be the activities comprising the "project in general" or "the specific activity authorized by the federal license or permit."

EPA requests comment on whether a different outcome might apply to Facility B. As discussed above, Facility B only needs an NPDES permit to discharge pollutants to commence operations. For purposes of this example, assume EPA will be issuing the NPDES permit because the jurisdiction in which the facility is sited does not have NPDES permit authority. In the case of Facility B, should the scope of the certifying authority's section 401 review for the Federal NPDES permit include the potential for water quality-related impacts from Facility B's "activity" broadly defined to include water quality-related impacts from Facility B's entire construction and operation, including aspects previously authorized by a FERC license or CWA 404 permit? Or should the scope of the certifying authority's section 401 review for Facility B's Federal NPDES permit include only those potential impacts caused by Facility B's activity narrowly defined as specifically authorized by the NPDES permit, *i.e.*, the discharge of

pollutants like heated water, oil, and grease introduced by the operation of Facility B's turbines, and not include other aspects of Facility B's construction and operation?

As discussed above, the choice of the narrower approach to defining "activity" within the context of "activity as a whole" may limit the kinds of conditions that may be placed on a project proponent's "activity" given that the scope of authorization under a more circumscribed permit, *e.g.*, the NPDES permit for Facility B, would extend to a narrower range of the project proponent's activities, *e.g.*, only the discharge of pollutants and not the other aspects of the dam's operation not regulated under section 402.

3. Water Quality Requirements

Under this proposal, when a certifying authority reviews a federally licensed or permitted activity, it must determine whether the "activity as a whole" will comply with "water quality requirements." Logically, the "activity as a whole" standard would apply to a certifying authority's evaluation of potential water quality effects under both sections 401(a)(1) and 401(d). This is because the two sections are inextricably linked. Section 401(d) requires a certifying authority to determine whether "the applicant" will—without additional conditions —comply with the specified CWA provisions and "any other appropriate" requirement of state law. Only if the certifying authority determines pursuant to section 401(d) that adding "any effluent limitations and other limitations, and monitoring requirements" to the license or permit will assure that water quality requirements will be met, may the certifying authority grant the certification contemplated by section 401(a)(1). The certifying authority's evaluations and determinations under sections 401(a)(1) and 401(d) do not work together in a harmonious fashion if the statute is interpreted to apply a different scope of review standard to each section.

Because EPA interprets the scope of certification review under sections 401(a)(1) and (d) to be the same, the same "activity as a whole" standard applies to a grant of certification, a grant of certification with conditions, and a denial. For example, when a certifying authority determines that it must add conditions under section 401(d) to justify a grant of certification

under section 401(a), that is equivalent to deciding that, without those conditions, it must deny certification. The standard for each of the potential certification decisions is therefore essentially the same.

To clarify which provisions of Federal and state law a certifying authority may consider when evaluating and ultimately deciding which action to take on a certification request pursuant to sections 401(a) and (d), the Agency is proposing to define the term "water quality requirements." *See* proposed § 121.1(m). The term "water quality requirements" is used throughout section 401, and the term "any other appropriate requirement of State law" is used in section 401(d), but neither term is defined in the CWA. The Agency did not interpret the term "water quality requirements" in the 1971 Rule, perhaps because the term "water quality requirements" was not introduced into section 401 until the 1972 CWA amendments, where it replaced the term "water quality standards" throughout the section. *See* Public Law 91-224, 21(b)(1), 85 Stat. 91 (1970); Public Law 92-500, 401, 85 Stat. 816 (1972). Accordingly, the 1971 Rule used the term "water quality standards" consistent with the text of the 1970 statutory version of the certification provision. Similarly, the 1971 Rule did not account for the term "other appropriate requirement of State law" since section 401(d) was not introduced until 1972.

The 2020 Rule defines the term "water quality requirements," and subsumes the phrase "any other appropriate requirement of State law" into the term "water quality requirements." 40 CFR 121.1(n); *see* 85 FR 42253. Consistent with what EPA characterized as the discharge-only scope of section 401, the preamble to the final 2020 Rule limited "water quality requirements" to only the enumerated provisions of the CWA listed in section 401(a)(1) and "state or tribal regulatory requirements for point source discharges into waters of the United States." 40 CFR 121.1(n). Citing Justice Thomas's dissent in *PUD No. 1*, the Agency relied on the principle *ejusdem generis* to argue that the term "appropriate requirement of State law" was limited "only to provisions that, like other provisions in the statutory list, impose discharge-related restrictions." 511 U.S. at 728 (Thomas, J., dissenting); 85 FR 42453. As a result, the 2020 Rule

significantly narrows the scope of review and ability of certifying authorities to include conditions to protect their water quality.

In proposing the definition of the term "water quality requirements" set out in this document, the Agency has reconsidered the 2020 Rule's definition of the term and finds it appropriate to interpret the term in a way that respects what EPA believes is the full breadth of the Federal and state water quality-related provisions that Congress intended a certifying authority to rely upon when developing its certification and conditions. Accordingly, EPA is now proposing to define "water quality requirements" to include any limitation, standard, or other requirement under the provisions enumerated in section 401(a)(1), any Federal and state laws or regulations implementing the enumerated provisions, and any other water-quality related requirement of state or tribal law regardless of whether they apply to point or nonpoint source discharges.

The text, purpose, and legislative history of the statute support the proposed interpretation of "water quality requirements." In section 401(d) Congress said that certifying authorities must include conditions in their certifications to assure that any applicant will comply with enumerated provisions of the CWA and "*any* other appropriate requirement of State law." 33 U.S.C. 1341(d) (emphasis added). The word "any" is capacious in its scope, literally meaning "all" such state law requirements and not just a limited subset, *e.g.*, point source-related requirements. While the word "appropriate" arguably provides a limiting principle with respect to which requirements may be considered and applied, the word "appropriate" is to be interpreted broadly in light of statute's text and purpose. *Michigan v. EPA,* 576 U.S. 743, 752 (2015) (stating that "appropriate" is a broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors). In this context, the word "appropriate" is more reasonably understood as specifying the "water quality-related" nature of such requirements and not their "point source" character. This interpretation is consistent with the water quality protection goals of the CWA, as well as the Supreme Court's affirmance of

EPA's longstanding interpretation in *PUD No. 1* that water quality certifications and their conditions must assure that the "activity as a whole"—and not just its point source discharges—does not adversely impact the quality of a certifying authority's waters.

Application of the maxim *ejusdem generis* to limit "appropriate requirement of State law" only to those state law provisions that impose discharge-related restrictions is misplaced. The list of CWA provisions referenced in section 401(a)(1), and in section 401(d) by incorporation, includes section 303, which addresses the requirement to adopt water quality standards for a state's waters. This requirement applies to such waters irrespective of the presence of point or nonpoint sources of pollution or pollutants. Moreover, as discussed earlier, even though Congress modified the language of section 21(b) to conform to the revised regulatory approach of the 1972 Act, it is clear from the legislative history that Congress intended new section 401 to be substantially the same as section 21(b) and not at all clear that Congress intended the restrictive reading of "appropriate requirement of State law" arguably suggested by use of that maxim.

Congress provided states with the primary role in protecting the Nation's waters from pollution, including pollution from Federal projects, and the phrase "water quality requirements" should be interpreted broadly to preserve state authority and further the section's protective goal. *See S.D. Warren,* 547 U.S. at 386 ("State certifications under [section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution . . . .").

The legislative history supports this interpretation. In earlier versions of section 401(d), Congress proposed to limit section 401(d) to the enumerated provisions from section 401(a)(1) and either "any more stringent water quality requirements under State law provided in section 510 of [the Act]," S. 2770, 92nd Cong. (1972), or "any regulation under section 316 of this Act." H.R. 11896, 92nd Cong. (1972). Ultimately, neither of those formulations was adopted. Instead, consistent with Congress's objective to empower states to protect their waters from pollution, Congress "expanded" the scope of section 401(d) "to also require compliance with any other

appropriate requirement of State law which is set forth in the certification." S. Rep. No. 92-1236, at 138 (1972) (Conf. Rep.).

EPA recognizes that, as noted by the Court in *PUD No. 1*, the authority granted to certifying authorities in section 401(d) "is not unbounded." 511 U.S. at 712. Rather, the scope is limited to "ensur[ing] that the project complies with 'any applicable effluent limitations or other limitations under [33 U.S.C. 1311, 1312] or other provisions of the Act,[']' and with any other appropriate requirement of State law.'" *Id*. Although the Court declined "to speculate on what additional state laws, if any, might be incorporated by this language," the Court found that "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to [section] 303 are 'appropriate' requirements of state law." *Id*. at 713. As discussed earlier in this section, EPA's longstanding position is that the scope of certification decisions and conditions are limited to water quality-related considerations. *See also American Rivers*, 129 F.3d at 107 ("Section 401(d), reasonably read in light of its purpose, restricts conditions that states can impose to those affecting water quality in one manner or another."). EPA's redefinition of the term "water quality requirements" is not intended to alter this interpretation.

The Agency does not, however, view the Act's focus on water quality-related considerations to mean that certifications and conditions may only be based on point source discharge provisions in either Federal or state law. As noted above, the legislative history on section 401 reveals that, although Congress contemplated a narrower interpretation of section 401(d) (*e.g.*, limited to the enumerated provisions and CWA section 316 in the House version), Congress ultimately codified an "expanded" scope of section 401(d).

In addition, EPA does not believe that the scope of a state's or tribe's certification review is limited only to water quality effects in bodies of water meeting the definition of "navigable waters" or "waters of the United States," or to water quality effects caused by point sources. There is nothing in the text of section 401 that compels either interpretation. Nor, as we said in the preamble to the 2020 Rule, is EPA aware of any court decisions that have directly addressed

the scope of waters covered by section 401. EPA acknowledges it articulated a different position on those issues in the 2020 Rule. 85 FR 42234-35 (July 13, 2020). However, upon reconsideration, EPA believes there are good reasons for changing its position now.

While the text of section 401(a)(1) says that the need for a certification is only triggered by a potential discharge into "the navigable waters," it does not state that, once the need for certification is triggered, a certifying authority must confine its review to potential water quality impacts to such "navigable waters." Indeed, while section 401(a)(1) says that the certifying authority must certify that "any such discharge" will comply with various provisions of the CWA, it does not limit the point of compliance for purposes of certifying authority review to the specific outfall point or to the waterbody ("navigable" or not) into which the triggering discharge occurs. Unlike section 401(a)(1), which uses the term "discharge" four times and "navigable waters" twice, section 401(d) uses neither term. Instead, the focus of section 401(d) falls on the conduct of, and need to assure compliance by, "the applicant" and its licensed or permitted activities, rather than—as with section 401(a)(1)—on the nature and compliance of the "discharge" to "navigable waters." Section 401(d) is thus arguably more expansive than section 401(a)(1), providing that the certification authority must assure that "any applicant" comply with the same provisions of the CWA, as well as "any other appropriate requirement of State law," and states may, under state law, protect state waters beyond those that are navigable. Again, there is no indication in the text or legislative history that Congress intended the scope of review under sections 401(a)(1) and (d) to assure such compliance be limited to "navigable waters." Had Congress desired to create such a limited scope of review, it could easily have done so. It did not.

This interpretation is reinforced by the fact that Congress intended section 401 to afford states broad power to protect their waters from harm caused by federally licensed or permitted projects. That intent is best realized by interpreting the scope of section 401 review and conditions as applying to impacts to all potentially affected state waters, not just the state's "navigable waters." Such an interpretation is also consistent with *PUD No.1's* affirmance of

EPA's determination that the proper scope of review is potential water quality impacts from the "activity as a whole." While the certification triggering discharge must itself be into a "navigable water," water quality impacts from the larger "project in general" or the "activity as a whole" might well occur in state waters at some distance from the triggering discharge. There is nothing in the phrase "any other appropriate requirement of State law," or the nature of CWA section 303(c) water quality standards, that would compel an interpretation that these water quality requirements could only support certification review or conditions to prevent water quality impacts to the state's "navigable waters" or caused by "point sources." Finally, an expansive interpretation of scope of review as applying to all potentially affected state waters is supported by CWA section 510, which—"[e]xcept as expressly provided"—preserves a state's authority and jurisdiction to protect its waters from pollution.

In the preamble to the 2020 Rule, EPA acknowledged that CWA sections 402 and 404 apply only to point source discharges to waters of the United States. 85 FR 42234. EPA does not disagree with that proposition here. However, the Agency no longer believes that the point source focus of sections 402 and 404, or the fact that section 401 is located in the first section of Title IV of the CWA, titled Permits and Licenses, means that—once the need for a certification has been triggered by a point source discharge into a water of the United States—a state may not consider potential water quality effects in non-navigable waters caused by the activity as a whole. EPA disagrees with and finds unpersuasive the 2020 Rule preamble's attempt to conflate section 401 with sections 402 and 404 by saying that "similar to the section 402 and 404 permit programs, section 401 is a core regulatory provision of the CWA." *Id*. While section 401 is certainly a critical element of the Act—indeed, it pre-dated the 1972 CWA amendments and was deemed so important that Congress carried it over—section 401 is a direct congressional grant of authority for states to protect their water resources from impacts caused by federally licensed or permitted projects that is significantly different in character from the Act's other Federal "regulatory" provisions. As such, it is more reasonable to interpret section 401's scope broadly to

effectuate that grant of authority, consistent with the reservation of state powers in section 510, rather than interpret section 401's scope as limited to consideration of point source discharges to or into waters of the United States like sections 402 and 404.

In the preamble to the 2020 Rule, the Agency said that "for many of the same reasons why the Agency is not interpreting the use of the word 'applicant' in section 401(d) as broadening the scope of certification beyond the discharge itself, the Agency is also declining to interpret section 401(d) as broadening the scope of waters and the types of discharges to which the CWA federal regulatory programs apply." *Id*. at 42235. As an initial matter, the Agency is not espousing in this document an interpretation of the scope of section 401 that in any way broadens the scope of basic Federal regulatory provisions like sections 402 and 404. Instead, the Agency is merely recognizing the fundamental difference between those Federal "regulatory" sections, whose scope is textually limited to point source discharges to or into waters of the United States, and the grant of state authority in section 401, which is not so limited. Indeed, to flip the argument EPA made in 2020, the reasons we have articulated above in support of broadening the scope of certification beyond the discharge itself also support expanding its scope beyond a state's navigable waters. The fact that the Agency continues to agree with the Ninth Circuit's analysis and holding in *Dombeck* that section 401 certification is not required for nonpoint source discharges does not compel a different interpretation with respect to these scope issues. *Dombeck*, 172 F.3d at 1098–99. Nor does EPA's interpretation of section 401(d)'s term "applicant" as authorizing states to add certification conditions that might protect "non-federal waters" in any way broaden the scope of the Federal regulatory programs enacted by the 1972 CWA amendments, *e.g.*, sections 402 and 404, beyond the limits that Congress intended. *See* 85 FR 42234-35. Section 401, although a neighbor to sections 402 and 404 in the CWA's organizational framework, is a fundamentally different provision and need not be interpreted according to those other provisions' strictures.

EPA is not offering an opinion in this rulemaking about what characteristics such a "State

law" or "Tribal law" must have to qualify as an appropriately "legal" basis for certification review or conditions under sections 401(a)(1) or 401(d). In the spirit of cooperative federalism, EPA defers to the relevant state and tribe to define which of their state or tribal provisions qualify as appropriate "State laws" or "Tribal laws" for purposes of implementing section 401.

EPA requests comment on this proposed definition of "water quality requirements," EPA's basis for proposing it, and any other potential definitions of the term "water quality requirements" EPA should consider adopting in the final rule.

F. Certification Decisions

1. Decisions on a request for certification

The CWA allows certifying authorities to make one of four decisions on a request for certification pursuant to their section 401 authority. A certifying authority may either grant certification, grant certification with conditions, deny certification, or it may expressly waive certification. A certifying authority may also constructively waive certification by failing or refusing to act in the reasonable period of time. This section briefly discusses each of the four decisions a certifying authority may make, including what each decision means and its impact on the Federal licensing or permitting process. This proposed interpretation of the four decisions a certifying authority may make is consistent with the Agency's interpretation in the 1971 and 2020 Rules.

First, a certifying authority may grant certification. A grant of certification means that the certifying authority has determined that the federally licensed or permitted activity as a whole will comply with water quality requirements. *See* section V.E in this preamble for further discussion of the scope of certification and the term "water quality requirements." Granting certification means that the license or permit may be issued. *See* 33 U.S.C. 1341(a)(1). Section 401(a)(1) provides that in circumstances where there are no applicable water quality requirements for an activity, the certifying authority "shall so certify." *Id*. EPA is proposing minor revisions to the regulatory language currently located at § 121.7(f) that describes this

scenario, with minor edits to reflect the proposed scope of certification.

Second, a certifying authority may grant certification with conditions. A grant of certification with conditions means that the certifying authority has determined that the federally licensed or permitted activity as a whole will comply with water quality requirements, but only if certain conditions are met. Section 401(d) provides that any certification condition shall become a condition on the Federal license or permit. *Id*. at 1341(d) ("Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [sections 301, 302, 306, and 307], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit . . . ."). As discussed later in section V.G in this preamble, circuit courts have routinely held that Federal agencies may not question or criticize a state's water quality conditions. *See, e.g., American Rivers*, 129 F.3d at 107 ("[Section 401(d)] is unequivocal, leaving little room for FERC to argue that it has authority to reject state conditions it finds to be *ultra vires*."). Granting certification with conditions means the Federal license or permit may be issued, provided the conditions are incorporated into that license or permit. The 2020 Rule includes regulatory text on the incorporation of certification conditions into a license or permit. *See* 40 CFR 121.10. The Agency is not proposing to retain any regulatory text on the incorporation of certification conditions. First, the 2020 Rule limits incorporation of certification conditions to only those that satisfy the content requirements at § 121.7(d). Section 401(d) clearly requires all certification conditions to become conditions on a Federal license or permit and does not limit incorporation to only those conditions that include certain regulatory defined components. As discussed in section V.G in this preamble, EPA does not interpret the statute as allowing a Federal agency to review whether a certifying authority included certain regulatorily defined elements in its certification decisions, nor question certifying authority conditions. Second, while the 2020 Rule requires Federal agencies to clearly identify certification conditions in their Federal license or

permit, section 401 does not require Federal agencies to distinguish certification conditions from other condition in their licenses or permits. If the Federal agency finds it useful to distinguish certification conditions for implementation purposes, the Federal agency may structure its license or permit in such a manner, but EPA does not find it necessary for the Agency to require such a distinction.

Third, a certifying authority may deny certification. A denial means that the certifying authority is not able to certify that the activity as a whole will comply with water quality requirements. If a certifying authority denies certification, the license or permit cannot be issued. 33 U.S.C. 1341(a)(1). The 2020 Rule includes regulatory text that discusses the effects of a denial of certification. *See* 40 CFR 121.8. The Agency is not proposing to retain any regulatory text that speaks to the effects of a denial of certification. First, the 2020 Rule provides that a certification denial does not preclude a project proponent from a submitting a new certification request. Section 401(a)(1) provides that a license or permit may not be granted if certification is denied, but it does not speak to new certification submittals following a denial. EPA does not find it necessary to add any additional direction or process for certification denials, beyond defining the contents of a certification denial (as discussed below). If a project proponent disagrees with a certifying authority's denial, the project proponent may challenge the certifying authority's decision in the appropriate court of jurisdiction. *See* S. Rep. 92-414 at 69 (1971) ("Should such an affirmative denial occur no license or permit could be issued by such Federal agencies . . . unless the State action was overturned in the appropriate courts of jurisdiction."). The 2020 Rule also provides that a Federal license or permit may not be issued if a certifying authority denies certification in the manner prescribed by the 2020 Rule (i.e., contains the contents defined at § 121.7(e)). As discussed in section V.G in this preamble, Federal agency review does not permit a Federal agency to review whether a certifying authority included certain regulatorily defined elements in its certification decisions. Accordingly, it is unnecessary to provide the Federal agency with the role of confirming that a denial is sufficient in the

regulatory text.

Fourth, a certifying authority may expressly waive certification. The statute explicitly provides for a constructive waiver if the certifying authority fails or refuses to act on a request for certification within the reasonable period of time. The statute does not expressly state that a certifying authority may expressly waive certification. However, EPA has determined that providing this opportunity in the proposed rulemaking is consistent with a certifying authority's ability to waive through failure or refusal to act. *See EDF v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) ("We do not interpret [the Act] to mean that affirmative waivers are not allowed. Such a construction would be illogical and inconsistent with the purpose of this legislation."). This interpretation is also consistent with the Agency's longstanding interpretation of the waiver provision. *See* 40 CFR 121.9(a)(1) (allowing a certifying authority to expressly waive certification via written notification); 40 CFR 121.16(a) (2019) (same). Additionally, continuing to allow express waivers may create efficiencies where the certifying authority knows early in the process that it will waive. An express waiver does not mean that the certifying authority has determined that the activity will comply with water quality requirements. Instead, an express waiver indicates only that the certifying authority has chosen not to act on a request for certification. Consistent with the statutory text, an express waiver enables the Federal agency to issue a license or permit.

2. Defining what it means "to act on a request for certification"

Once a certifying authority receives a request, the certifying authority must "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. 1341(a)(1). The phrase "to act on a request for certification" is not defined in the statute; nor did EPA define it in the 1971 or 2020 Rules. To provide greater clarity regarding how a certifying authority "act[s] on a request for certification" within the reasonable period of time, EPA is proposing to define the phrase "to act on a request for certification" to mean that a certifying authority is making one of the four certification

decisions discussed above: granting certification, granting certification with conditions, denying certification, or expressly waiving certification.

In pre-proposal feedback, a few stakeholders asked the Agency to provide additional clarification regarding what it means to "act on a request for certification." For example, would decisions beyond the four just discussed qualify as acting (*e.g.*, would a certifying authority "act on a request for certification" if it requested that the project proponent withdraw and resubmit its certification request)? Specifically, states and tribes expressed concern about their ability to make one of the four above-described decisions on a request for certification within the reasonable period of time, especially for larger, more complex projects. Recent case law has also highlighted the need to clarify this issue, particularly in instances where a certifying authority does not wish to waive certification. The D.C. Circuit has further suggested that acting on a request for certification does not include participating in a coordinated withdrawal and resubmission "scheme." *See Hoopa Valley Tribe*, 913 F.3d at 1101-02.[46] The Fourth Circuit recently held that it was permissible for the project proponent to withdraw its application in order to avoid a certification denial as long as the certifying authority and project proponent were not in a "coordinated withdrawal and resubmission scheme." *NCDEQ*, 3 F.4th at 672, 676. However, the court also suggested that the section 401 phrase "to act" could be interpreted to mean something different than a final agency action on a request for certification. According to the court, a certifying authority that "takes significant and meaningful action" and "in good faith takes timely action to review and process a certification request likely would not lose its authority to ensure that federally licensed projects comply with the State's water-quality standards, even if it takes the State longer than a year to make its final certification decision" *Id.*

[46] The D.C. Circuit held that California and Oregon had waived their section 401 authority by allowing the project applicant to repeatedly withdraw and resubmit the same certification request to avoid exceeding the reasonable period of time deadline. 913 F.3d at 1101. The D.C. Circuit also found that FERC's interpretation of "act on a request" as allowing the states to "indefinitely delay" its review was arbitrary and capricious and not within the bounds of its authority under section 401. *Id*. at 1102.

at 670.

Some stakeholders have expressed concern with the *NCDEQ* approach, noting that it may make the section 401 certification process less predictable and transparent. EPA shares those concerns. The Agency is concerned that interpreting "to act on a request for certification" as any "significant and meaningful action" might inject significant uncertainty and subjectivity into the certification process (*e.g.*, what is a "significant and meaningful action?") causing significant confusion for stakeholders.

Although the Agency has never explicitly defined "to act on a request for certification," prior Agency guidance and the 2020 Rule preamble took the position that certifying authorities must make a decision on a request for certification within the reasonable period of time. For instance, in the 2010 Handbook, EPA stated that to avoid constructively waiving certification, the certifying authority should "verify the time available for [its] certification decision."[47] One implication of this language is that the Agency thought that "to act on a request for certification" means to make a final decision on the request (*i.e.*, grant, grant with conditions, deny, or expressly waive certification). Courts appear to agree. *See, e.g.*, *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (noting that "[i]n imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request"); *NYDEC*, 884 F.3d at 455-56 (noting that a state must act after receiving a certification request and that denial "would constitute 'acting' on the request under the language of Section 401").

Based on stakeholder feedback and recent court cases suggesting ambiguity with respect to what it means for a certifying authority to act, EPA is proposing to clarify that the phrase "to act on a request for certification" means that a certifying authority makes one of the four above-described certification decisions: grant, grant with conditions, deny, or expressly waive. In light of the case law and EPA's prior statements and practice, EPA thinks this is the most reasonable

[47] *See* 2010 Handbook, at 11 (rescinded).

interpretation of what it means for a certifying authority "to act on a request for certification." It also provides stakeholders with a clear and predictable endpoint for knowing when the certifying authority has failed or refused to act, resulting in a waiver. *See* 33 U.S.C. 1341(a)(1) ("If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."). The Agency is requesting comment on the proposed interpretation of what it means to act on a request for certification, as well as any alternative interpretations (*e.g.*, *NCDEQ* approach).

3. Failing or refusing to act on a request for certification

The Agency is also proposing to clarify what it means for a certifying authority to fail or refuse to act on a request for certification. As discussed above, the Agency is proposing to define "act on a request for certification" as the certifying authority making one of four certification decisions: grant, grant with conditions, deny, or expressly waive. If the certifying authority fails to take one of these actions, the certification may be treated as a constructive waiver. Consistent with the statutory text, when a certifying authority waives the requirement for a certification, the Federal agency may proceed to issue the license or permit. 33 U.S.C 1341(a)(1).

The plain language of section 401(a)(1) provides that the certification requirement is waived if a certifying authority "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)." *Id*. Section 401(a)(1) clearly indicates Congress's intent to limit constructive waivers to situations where a certifying authority did not act. *See id*. ("No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence."). The legislative history of this provision suggests that constructive waivers were intended to prevent delays in the Federal licensing or permitting process due to the certifying authority's inactivity. *See* H. Rep. No 92-911, at 122 (1972) ("In order to insure that sheer inactivity by the State, interstate agency or Administrator as the case may be, will not frustrate the Federal application, a

requirement, that if within a reasonable period, which cannot exceed 1 year, after it has received a request to certify the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on the request for certification, then the certification requirement is waived."). Similarly, the 1971 Rule and subsequent Agency guidance recognized that constructive waivers could occur due to certifying authority inaction. *See* 40 CFR 121.16(b) (2019) (noting that constructive waivers occurred upon the "failure of the State . . . concerned to act on such a request for certification within a reasonable period of time after receipt of such request"); 2010 Handbook, at 11 (rescinded) ("State and tribes are authorized to waive [section] 401 certification . . . by the certification agency not taking action.").

The 2020 Rule's interpretation of what it means for a certifying authority to fail or refuse to act departs from the longstanding Agency position on constructive waivers. The 2020 Rule allows a Federal agency to determine that a certifying authority had failed or refused to act, and thereby waived certification, where the certifying authority's action on a request for certification was procedurally deficient (*e.g.*, did not follow the 2020 Rule's procedural requirements for a denial of certification). 40 CFR 121.9(a)(2); 85 FR 42266. Similarly, a Federal agency can determine that a certification condition is waived if the condition does not comply with procedural requirements of the 2020 Rule. *Id*. at 42250. This aspect of the 2020 Rule drew considerable pre-proposal input from certifying authorities who argued that this interpretation could result in a Federal agency "veto" of a section 401 certification, and was contrary to the statute and the legislative history. EPA similarly expressed concern in its Federal Register notice announcing its intent to revise the 2020 Rule, noting that "a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of non-substantive and easily fixed procedural concerns identified by the federal agency." 86 FR 29543 (June 2, 2021).

The 2020 Rule's interpretation of waiver is not consistent with the plain language of the statute and its legislative history. The mere failure of a certifying authority to include certain

regulatorily defined elements in its certification decisions or comply with other procedural requirements of section 401, such as providing public notice on a request for certification, do not qualify as the kind of "sheer inactivity" that Congress contemplated would result in a constructive waiver. Consistent with the statutory language, legislative history, and prior Agency interpretation, EPA is proposing to revise the regulatory text to clarify that constructive waivers may only occur if a certifying authority fails or refuses to take one of the four actions described in this section within the reasonable period of time.

4. Contents of a certification decision

To provide further clarity on how a certifying authority may "act on a request for certification," EPA is also proposing to define the contents of a certification decision. Accordingly, EPA is proposing to remove the regulatory text currently located at § 121.7(b), which characterizes what actions a certifying authority may take based on its evaluation of the request for certification. The regulatory text proposed at § 121.7(c)-(f) sufficiently defines the contents of each certification decision and identifies the actions a certifying authority may take based on its evaluation of the request for certification such that EPA believes it would be redundant to retain separate regulatory text restating the same ideas.

While the statute provides that certifying authorities may make one of four decisions when processing a certification request, the CWA does not explicitly describe the contents or elements of a certification decision. EPA's 1971 Rule defined the contents of a certification and express waiver decision for all certifying authorities. The 1971 Rule's enumeration of the contents of a certification decision were simple but effective and included the name and address of the applicant, a statement that the certifying authority examined the application, a statement that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards," and other information deemed appropriate by the certifying authority. 40 CFR 121.2(a) (2019). In addition, the 1971 Rule provided that a certification could be waived upon either (1) written notification from the certifying authority

that it expressly waived its authority to act on a request, or (2) written notification from the licensing or permitting agency regarding the failure of the certifying authority to act on a request for certification within the reasonable period of time. 40 CFR 121.16 (2019). The 1971 Rule did not define the contents of a certification denial or provide specific requirements for how to articulate and incorporate a certification condition.

In the 2020 Rule, EPA updated those requirements for each type of certification decision and more fully addressed the effects of those decisions. First, it provides that, when a certifying authority granted certification under the 2020 Rule, the certification must be in writing and include a written statement that the discharge from the proposed federally licensed or permitted project would comply with water quality requirements. 40 CFR 121.7(c); 85 FR 42286.

Second, when a certifying authority grants certification with conditions, the 2020 Rule requires that the certifying authority explain the necessity of each condition and provide a citation to an applicable Federal, state, or tribal law. 40 CFR 121.7(d); 85 FR 42286. This was a change from the 1971 Rule, which broadly provided for certifying authorities to include conditions as they "deem[ed] necessary or desirable." 40 CFR 121.2(a)(4) (2019). The 2020 Rule preamble stated that the new requirements were "intended to increase transparency and ensure that any limitation or requirement added to a certification . . .is within the scope of certification." 85 FR 42256. Additionally, EPA observes that this provision is similar to EPA's NPDES program-specific section 401 regulations. *See* 40 CFR 124.53(e)(2) (requiring a citation for any conditions more stringent than those in the draft permit).

Third, unlike the 1971 Rule, under which certification denials were undefined, the 2020 Rule defines the contents of a denial. Specifically, the 2020 Rule requires certification denials to be made in writing and to identify any water quality requirements with which the discharge will not comply, include a statement explaining why the discharge would not comply with those requirements, and provide any specific water quality data or information that would help explain a denial based on insufficient information. 40 CFR 121.7(e); 85 FR 42286.

Fourth, the 2020 Rule includes similar language to the 1971 Rule for express waivers and required written notification from the certifying authority indicating an express waiver of its authority to act on a request for certification. 40 CFR 121.9(a)(1); 85 FR 42286 (July 13, 2020). Lastly, under the 2020 Rule, EPA defined constructive waiver as a certifying authority's "failure or refusal to act on a certification request" which included failing or refusing to 1) act within the reasonable period of time, 2) satisfy the requirements for a grant or denial of certification, or 3) comply with other procedural requirements of section 401 (*e.g.*, provide public notice on a certification request). 40 CFR 121.9(a)(2); 85 FR 42286. The 2020 Rule also provided that waivers could occur if the certifying authority failed or refused to satisfy the requirements of any certification conditions. 40 CFR 121.9(b); 85 FR 42286. *See* section V.G in this preamble for further discussion on constructive waivers and the role of Federal agencies.

The stated purpose of the 2020 Rule requirements was to promote transparency and consistency in certification decisions and to help streamline the Federal licensing and permitting processes. 85 FR 42220 (July 13, 2020). However, in pre-proposal input, several certifying authorities said that the 2020 Rule's requirements for the contents of certification decisions delayed rather than streamlined the certification process. Conversely, in pre-proposal outreach, project proponents expressed interest in keeping the 2020 Rule requirements for the added transparency and argued that it is helpful when certifying authorities explain their final certification decisions (especially denials). Project proponents have also argued that certifying authorities benefit from including this additional information in their certification decisions because it helps build complete and legally defensible administrative records to support their certification actions.

Under this proposed approach, similar to the approach taken in the 2020 Rule, EPA is proposing revisions to the regulatory text currently located at § 121.7(a) to clarify that all certification decisions should: be in writing; clearly state whether the certifying authority has chosen to grant, grant with conditions, deny, or expressly waive certification; be within the scope

of certification, as defined at proposed § 121.3; and be taken within the reasonable period of time, as determined pursuant to proposed § 121.6.

Like the approach taken in the 1971 and 2020 Rules, EPA is proposing to include some requirements for each of the four types of certification decisions. This approach addresses both the workload concerns expressed by certifying authorities, and the desire of project proponents for increased transparency and consistency in the certification process. The list of elements required for each certification decision will provide predictability and still allow certifying authorities the flexibility to add additional elements of their own under state or tribal law. EPA does not anticipate that this proposed approach will be controversial because it is generally consistent with the approach taken in the 1971 Rule and 2020 Rule.

Consistent with the position taken in the 2020 Rule, the Agency has opted to retain contents of a certification decision consistent with the 1972 statutory language. Unlike the 2020 Rule, the 1971 Rule included language that reflected the predecessor statute. For example, the 1971 Rule required certifications to include a "statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 CFR 121.2(3) (2019). As discussed in section IV.A in this preamble, the 1972 CWA revised the predecessor version of section 401 to reflect the changed emphasis from complying with "water quality standards" to complying with "the applicable provisions of sections 301, 302, 303, 306, and 307" of the CWA. 33 U.S.C. 1341(a)(1). Additionally, Congress added section 401(d) that requires a certifying authority to include "any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply" with the enumerated provisions of the CWA and any other appropriate requirement of state law. *Id*. at 1341(d). Consistent with this change, the Agency is proposing to retain a similar provision as the 2020 Rule that certification decisions to grant, grant with conditions, or deny certification must indicate whether the certifying authority has determined that an activity will comply with the water quality requirements identified in the

1972 CWA, not just water quality standards. Additionally, consistent with the proposal's scope of certification, EPA is proposing that certification decisions must indicate whether the activity as a whole, as opposed to the discharge, will comply with water quality requirements. *See* section E of this proposal for further discussion on the scope of certification.

Similar to the Agency's position in the 2020 Rule, the Agency does not think that retaining the 1972 statutory language "will comply" in the proposed regulations requires certifying authorities to provide absolute certainty that applicants for a Federal license or permit will never violate water quality requirements. *See* 85 FR 42278 (July 13, 2020). This is not EPA's intention, and EPA does not think such a stringent interpretation is required by the statutory or proposed regulatory language. The use of language comparable to "will comply" is not uncommon in CWA regulatory programs. For example, CWA section 402 contemplates that NPDES permits will only be issued upon a showing that discharge "will meet" various enumerated provisions of the CWA. 33 U.S.C. 1342(a). This standard has not precluded states, tribes, or EPA from routinely issuing NPDES permits to allow pollutant discharges.

Nor does EPA expect that the use of "will comply" will impede or limit a certifying authority's ability to act on a request for certification. Additionally, the Agency does not think that this proposed language prevents certifying authorities from relying on modeling information, which provides an informed projection of potential impacts, to make a certification decision. When a certifying authority makes a certification decision, EPA believes that the certifying authority would be certifying that the "activity as a whole" will comply with water quality requirements for the life of the license or permit and not just at the moment the license or permit is issued. The lifespan of FERC licenses can be decades, whereas section 402 or 404 permits last five years. Given the possible lifespan of a license or permit, and the possibility that water quality-related changes or impacts may occur due to climate change or other factors during that time, it is reasonable (and perhaps essential in some cases) for certifying authorities to rely on modeling to inform certification decisions. EPA does not intend or expect the use of the term

"will comply" to limit or impact a certifying authority's ability to rely on such modeling to support its certification decisions.

Since EPA is defining "to act on a request for certification" as making one of four certification decisions, it is reasonable for EPA to identify a non-exhaustive list of contents for each of those certification decisions. Under EPA's proposal, certifying authorities would be free to add additional elements or information requirements to any of these four certification decisions to provide stakeholders with clarity and transparency. For example, a certifying authority may choose to require a citation to applicable Federal or state water quality requirements to support a certification condition. For its part, EPA is not proposing to include this additional requirement as a Federal regulatory element as it did in the 2020 Rule.

The following paragraphs describe the Federal requirements EPA is proposing to adopt for each of the four kinds of certification decisions. Under this proposal, each of the four kinds of certification decisions must be in writing and include the name and address of the project proponent and identification of the applicable Federal license or permit. Additionally, each of the four kinds of certification decisions includes other requirements.

First, any grant of certification shall include a written statement that the federally licensed or permitted activity as a whole "will comply" with water quality requirements. While the 1971 Rule required a statement that there was "reasonable assurance," 40 CFR 121.2(a) (2019), as explained above, the 2020 Rule uses the term "will comply" which is more consistent with the 1972 statutory language used in sections 401(a)(1) and 401(d).

Second, EPA is proposing that any grant of certification with conditions shall (1) identify any conditions necessary to assure that the activity as a whole will comply with water quality requirements and (2) include a statement explaining why each condition is necessary to assure that the activity as a whole will comply with water quality requirements. This proposal reflects the language used in section 401(d) and is similar to the approach taken under the 1971 and 2020 Rules. A statement explaining why a condition is necessary will help project proponents and

Federal agencies understand the reason for the condition and assist in its implementation. EPA anticipates that such information is readily available to the certifying authority as part of its decision-making process. However, unlike the 2020 Rule, the Agency is not proposing to require certifying authorities to include a specific statutory or regulatory citation in support of a certification condition. Rather, the Agency will let certifying authorities decide what relevant information to provide in support of any conditions. Additionally, EPA is not proposing to distinguish between certification decisions based on an individual or a general license or permit. Although EPA made such a distinction in the 2020 Rule, EPA finds it unnecessary here because the few relevant proposed regulatory requirements apply to a certification with conditions regardless of the nature of the license or permit. EPA is proposing limited regulatory requirements in this area, anticipating that certifying authorities will work with project proponents and Federal agencies to determine what information would be most useful (*e.g.*, statutory or regulatory citations).

Consistent with this approach, EPA recognizes that certification conditions are an important tool that enable certifying authorities to ensure that projects needing Federal licenses or permits will be able to move forward without adverse impacts to water quality. EPA encourages certifying authorities to develop certification conditions in a way that enables projects to adapt to future water quality-related changes, *i.e.*, so-called "adaptive management conditions." For example, if a certifying authority is concerned about future downstream, climate change-related impacts on aquatic species due to increased reservoir temperatures during the lifespan of a hydropower dam license, the certifying authority might develop a condition that would allow a project proponent to take subsequent, remedial action in response to reservoir temperature increases (*e.g.*, conditions that might require, as necessary, a change in reservoir withdrawal location in the water column, a change in the timing of releases, etc.). To ensure project proponents and Federal agencies understand and are able to implement any such adaptive management conditions, EPA recommends that certifying authorities clearly define and explain

the basis for these conditions and the circumstances in which adaptive management conditions may spring into effect (*e.g.*, expectations for undertaking additional planning and monitoring; thresholds triggering adaptive responses; requirements for ongoing compliance). EPA has previously acknowledged the use of "adaptive management" conditions in prior guidance, *see, e.g.,* 2010 Handbook, at 32, and will explore the development of other guidance on this topic in the future. EPA requests comment on whether it should define in more detail—as it did in the 2020 Rule—what information should be included in support of a certification condition and examples of such information (*e.g.*, statutory and regulatory citations).

Third, EPA is proposing that any denial of certification shall include a statement explaining why the certifying authority cannot certify that the proposed activity as a whole will comply with water quality requirements. Although the 1971 Rule did not define the elements of a decision to deny certification, this concept was introduced in the 2020 Rule. The proposed requirements for a denial of certification are similar to the requirements in the 2020 Rule. However, the Agency is not proposing to retain the 2020 Rule requirements to identify the specific water quality requirements with which the project will not comply nor require the certifying authority to describe the missing data or information that would be necessary in instances where the denial is due to insufficient information. *See* 40 CFR 121.7(e). Rather, EPA's few relevant regulatory requirements anticipate that certifying authorities will work with project proponents and Federal agencies to determine what information would be most useful. Additionally, EPA is not proposing to distinguish between certification decisions based on an individual or a general license or permit. Although EPA took this approach in the 2020 Rule, EPA finds that the few relevant proposed regulatory requirements apply to a denial of certification regardless of the nature of the license or permit. EPA does not expect this to be a burdensome requirement for certifying authorities. As a practical matter, certifying authorities will likely already have developed and considered such information as part of their decision-making process and included it in the record to substantiate their decision. Aside from borrowing

from their decision-making record, EPA expects that certifying authorities may be able to satisfy this requirement in a number of ways. For example, certifying authorities could identify specific water quality requirements with which the activity as a whole will not comply, or identify what information about the project or potential water quality effects is missing or incomplete that led the certifying authority to not be able to determine whether the activity as a whole will comply with water quality requirements. This proposal to provide at least a succinct explanation for the certification denial will provide necessary transparency and clarity for project proponents and Federal agencies.

Lastly, consistent with the 1971 Rule and 2020 Rule, EPA is proposing that any express waiver made by a certifying authority shall include a statement from the certifying authority stating that it expressly waives its authority to act on a request for certification. As noted above, an express waiver indicates only that the certifying authority has chosen not to act on a request for section 401 certification. Accordingly, the certifying authority only needs to state that it is waiving certification and does not need to make any statement about why it has decided to waive or its assessment of the project's impact on its water quality.

EPA is also proposing to delete 40 CFR 124.53(e), which addresses the contents of a certification for an EPA-issued NPDES permit. The contents identified at § 124.53(e) are not consistent with the contents identified at proposed § 121.7(c) and (d). For example, § 124.53(e) requires a citation (but not an explanation) for each condition of certification, whereas proposed § 121.7(d) requires an explanation (but not a citation) for each condition. Further, § 124.53(e)(1) and proposed § 121.7(d)(2)—both of which identify what conditions must be included in a certification—are distinct. Proposed § 121.7(d)(2) incorporates the proposal's concepts of "the activity as a whole" and "water quality requirements" while § 124.53(e)(1) does not. EPA intends for all certification decisions, including those on EPA-issued NPDES permits, to comply with the requirements discussed above and proposed at § 121.7.

EPA is requesting comment on the proposed approach described above, including

whether the Agency should include additional or alternative requirements for certification actions. The Agency is also requesting comment on an alternative approach that would only require a limited list of contents for certification decisions when EPA acts as a certifying authority. This alternative approach would not delineate any specific requirements for certification decisions made by any other certifying authority.

G. Federal Agency Review

The proposed rule confirms the Agency's longstanding position prior to the 2020 Rule that Federal agencies may review a certification decision only for the limited purpose of ensuring that the decision meets a handful of facial statutory requirements. Specifically, EPA is proposing that Federal agencies may review a certifying authority's certification decision to determine (1) whether the decision clearly indicates the nature of the decision (*i.e.*, is it a grant, grant with conditions, denial, or express waiver), (2) whether the proper certifying authority issued the decision, (3) whether public notice was provided, and (4) whether the decision was issued within the reasonable period of time. As discussed below, the Agency views this Federal agency review role as consistent with Agency practice prior to the 2020 Rule and case law.

Section 401 does not expressly provide a defined role for Federal licensing or permitting agencies to review certifications or change certification conditions. However, the Agency has long recognized, both in regulation and guidance, some degree of appropriate Federal agency review of certification decisions. The 1971 Rule provides Federal agencies with the ability to determine whether a certifying authority acted within the reasonable period of time. *See* 40 CFR 121.16(b) (2019) ("The certification requirement with respect to an application for a license or permit shall be waived upon . . . Written notification from the licensing or permitting agency to the Regional Administrator of the failure of the State or interstate agency concerned to act on such request for certification within a reasonable period of time after receipt of such request . . . ."). Prior EPA guidance acknowledged that the Federal licensing or permitting agency may review the procedural requirements of a certification decision. 2010 Handbook, at

32 (rescinded) (citing *American Rivers*, 129 F.3d at 110-111; *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006)) ("For example, the federal permitting or licensing authority may review the procedural requirements of [section] 401 certification, including whether the proper state or tribe has certified, whether the state or tribe complied with applicable public notice requirements, and whether the certification decision was timely."). However, this guidance also acknowledged the limitations of Federal agency review and stated that Federal agencies cannot pick and choose among a certifying authority's certification conditions. *Id*. at 10 (citing *American Rivers*, 129 F.3d at 110-111).

Prior Agency guidance relied heavily on case law addressing the question of Federal agency review. A few courts have acknowledged a limited role for Federal agencies to ensure that a certifying authority meets certain facial requirements of section 401. The D.C. Circuit has held that section 401(a)(1) authorized FERC, as the relevant Federal licensing agency, "to determine that the specific certification 'required by [section 401 has] been obtained,'" because otherwise, "without that certification, FERC lack[ed] authority to issue a license." *City of Tacoma*, 460 F.3d at 67-68 ("If the question [raised to FERC] regarding the state's section 401 certification is not the application of state water quality standards but compliance with the terms of section 401, then FERC must address it."). The court did not define what a "certification required by this section" included, but suggested it included at a minimum, "explicit requirement[s] of section 401," including that the certifying authority provide public notice, which was the section 401 requirement at issue in the case before the court. *Id*. at 68. It is important to note that, while the court found that FERC had an obligation under the facts of that case to confirm the public notice requirement was satisfied, the court did not frame this requirement as a prerequisite in every instance where the agency is presented with a certification decision. Rather, the court found that FERC had to confirm compliance in the case before it because public notice had been "called into question." *See id*.

In an earlier case, the Second Circuit ruled that FERC did not have authority to

substantively review certification conditions to "decide which conditions are within the confines of [section] 401(d) and which are not." *American Rivers*, 129 F.3d at 107. In reaching this conclusion, the court noted that FERC nonetheless did have authority to determine whether the appropriate certifying authority issued the certification decision and whether the certification decision was issued within the reasonable period of time. The court explained that, "[w]hile [FERC] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, [FERC] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of [section] 401." *Id*. at 110-11.

Under the 2020 Rule, the Federal agency may review a certification to confirm that a number of certification requirements are met as a prerequisite to accepting the certification decision. 85 FR 42267. Specifically, the 2020 Rule relies on *City of Tacoma* to assert that the plain language of section 401 requires Federal licensing or permitting agencies "to confirm that the state has facially satisfied the express requirements of section 401." 85 FR 42267-68 (quoting *City of Tacoma*, 460 F.3d at 68). The 2020 Rule requires the Federal licensing agency to ensure (1) compliance with "other procedural requirements of section 401" (which included public notice requirements), (2) compliance with the reasonable period of time, and (3) compliance with the rule's requirements related to providing a legal and technical basis within the certification document for the action taken. The 2020 Rule contains little direction to Federal agencies about how to ensure that those components are met (*e.g.*, how to confirm public notice took place), other than noting in the preamble that the Federal agency's review role does not require the agency to "make a substantive inquiry into the sufficiency of the information provided in support of a certification, condition, or a denial." *Id*. at 42268.

This lack of clarity in the 2020 Rule has led to stakeholder confusion and misunderstanding about the nature of the Federal agency's review (*e.g.*, assertions from both Federal agencies and states and tribes that the review is to be "substantive" in nature).

Additionally, although the 2020 Rule limits Federal agency review to certain procedural components, Federal agency stakeholders expressed concerns about even this responsibility. In this vein, the 2020 Rule preamble says that "[i]f a federal agency, in its review, determines that a certifying authority failed or refused to comply with the procedural requirements of the Act, including the procedural requirements of this final rule, the certification action, whether it is a grant, grant with conditions, or denial, will be waived." *Id*. at 42266. The 2020 Rule takes the same approach with review of individual conditions, *i.e.*, if a condition does not meet procedural requirements, it is waived (even though the certification itself stands). *Id*. at 42263. The 2020 Rule does not extend Federal agency review to more substantive requirements of the Act (*e.g.*, whether a certification decision was within the scope of certification). *Id*. at 42267.

In pre-proposal feedback for this rule, certifying authorities expressed concern over the potential consequences of Federal agency review required by the 2020 Rule. These stakeholders said that, contrary to the plain language of the statute and legislative history, the 2020 Rule gives Federal agencies the ability to effectively "veto" a state or tribal water quality certification, with no ability for the certifying authority to fix errors or submit additional explanatory information. EPA reflected this concern in its recent *Federal Register* document, stating that "EPA is concerned that a federal agency's review may result in a state or tribe's certification or conditions being permanently waived as a result of nonsubstantive and easily fixed procedural concerns identified by the federal agency." 86 FR 29543 (June 2, 2021).

The following subsections discuss the extent of Federal agency review, the Federal agency review process, and consequences of such review under this proposal.

1. Extent of Federal Agency Review

The Agency is proposing to reaffirm its longstanding interpretation prior to the 2020 Rule that Federal agencies may review certification decisions only for the limited purpose of ensuring decisions will meet certain facial statutory requirements. Federal agency review of such requirements does not require a Federal agency to inquire into whether the certification is

consistent with the substantive elements of Federal, state, or tribal law. In fact, consistent with prior Agency guidance and the 2020 Rule, section 401 does not authorize Federal agencies to review or change the substance of a certification (*e.g.*, determine whether the certification or its conditions is within section 401's scope of review). *See* 86 FR 42268; 2010 Handbook, at 10 (rescinded).

Circuit courts have routinely held that Federal agencies may not question or criticize the substance of a state's water quality certification or conditions, *sees, e.g., City of Tacoma*, 460 F.3d at 67 ("[The Federal agency's] role is limited to awaiting, and then deferring to, the initial decision of the state."); *American Rivers*, 129 F.3d at 111 ("[The Federal agency] does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of [section] 401."); *U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the states through section 401 certificates."). Courts have also cautioned Federal agencies against imposing conditions they believe are more stringent than the certifying authority's conditions. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 648 (4th Cir. 2018) ("the plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality"); *see also Lake Carriers' Ass'n. v. EPA*, 652 F.3d 1, 6, 12 (D.C. Cir. 2011) (concluding that additional notice and comment on state certification conditions would have been futile because "the petitioners have failed to establish that EPA can alter or reject state certification conditions. . . .").

Rather, courts have generally found that Federal agencies may review certification decisions only to see whether the water quality certifications satisfy the minimum facial requirements of section 401, including whether the decision was issued within the reasonable period of time, whether public notice was provided, and whether the proper certifying authority issued the decision. The court in *City of Tacoma* found that if the facial public notice

requirement of section 401 is "called into question" before the Federal agency, the Federal agency must determine if it was met. 460 F.3d at 68 (requiring the Federal agency "to obtain some minimal confirmation of such compliance, at least in a case where compliance has been called into question.").

Therefore, and consistent with the case law, EPA is proposing that Federal agency review of a certification decision is limited to four factors. First, a Federal agency may review a certification decision to confirm the nature of the decision (*i.e.*, whether the certification decision is a grant, grant with conditions, denial, or express waiver). Section 401 requires a project proponent to obtain either a certification or waiver before the Federal agency may issue the license or permit. If a certifying authority denies certification, then the license or permit may not be issued. The Federal agency must determine whether "the specific certification 'required by [section 401 has] been obtained,'" because otherwise, "without that certification, [the Federal agency] lacks authority to issue a license." *Id.* at 67-68. It is thus reasonable for a Federal agency to review a certification decision to ensure it understands which action the certifying authority took (*i.e.*, grant, grant with conditions, deny, or expressly waive).

Second, a Federal agency may confirm that the proper certifying authority issued the certification decision. Section 401 requires a project proponent to seek certification from the jurisdiction in which the discharge originates or will originate. 33 U.S.C. 1341(a)(1). Allowing a Federal agency to confirm that the proper certifying authority—meaning the certifying authority for the jurisdiction where the discharge originates or will originate—has issued certification is consistent with case law, *American Rivers*, 129 F.3d at 110-11, and prior Agency regulations and guidance, 85 FR 42267; 2010 Handbook, at 10 (rescinded).

Third, a Federal agency may review a certification decision to determine whether the certifying authority complied with its own established procedures for public notice on requests for water quality certification. Section 401 requires a certifying authority to provide procedures for public notice, and a public hearing where necessary, on a certification request. 33 U.S.C.

1341(a)(1). In *City of Tacoma*, the court held that the Federal agency had a statutory obligation to confirm whether the certifying authority complied with its public notice procedures in issuing the certification because compliance had been called into question. 460 F.3d at 68. "Otherwise, [the Federal agency] has no assurance that the certification the state has issued satisfies section 401." *Id*. As discussed above, prior Agency guidance and regulations have recognized this form of Federal agency review. *See* 85 FR 42267; 2010 Handbook, at 10 (rescinded).

Lastly, a Federal agency may review a certification decision to confirm whether it was issued within the reasonable period of time. Section 401 establishes one year as the outer bound of the reasonable period of time. 33 U.S.C. 1341(a)(1); H.R. Rep. No. 91-940, at 54-55 (March 24, 1970) (Conf. Rep) (adding a timeline for state certification "[i]n order to insure that sheer inactivity by the State . . . will not frustrate the Federal application"). It is thus reasonable for the Federal agency to determine whether a certifying authority failed to act within the reasonable period of time, and this has been the Agency's longstanding position in regulation and guidance. *See* 40 CFR 121.16(b) (2019); 85 FR 42267; 2010 Handbook, at 10 (rescinded). Additionally, as discussed above, this is also consistent with case law on Federal agency review. *See American Rivers*, 129 F.3d at 110-11 (explaining that FERC "may determine … whether a state has issued a certification within the prescribed period"); *see also Alcoa Power Generating*, 643 F.3d at 972-73 (holding that, like the public notice requirements at issue in *City of Tacoma*, the issue of whether a certifying authority acted upon a certification request within the statutory one-year period was an issue properly before FERC).

EPA does not find that Federal agencies have the authority to review other aspects of a certification decision for purposes of determining whether a "certification required by [section 401] has been obtained or has been waived." 33 U.S.C. 1341(a)(1). EPA's proposal to clearly define the extent of Federal agency review in regulatory text is found in proposed § 121.9. EPA requests comment on its proposed approach, including whether section 401 authorizes other aspects of a certification decision to be subject to Federal agency review.

2. Federal Agency Review Process

This proposed rule also attempts to clarify the manner in which Federal agency review would occur. Section 401 does not expressly address what specific information certifying authorities must include in a certification decision, nor does it address the process of Federal agency review. While the statute does contain important information about the identity of the appropriate certifying authority, the length of the reasonable period of time, and a requirement for public notice, it does not prescribe how a certifying authority must demonstrate compliance with those requirements or describe the extent to which they are subject to Federal agency review.

EPA is not proposing to define what specific information a certifying authority must include in its certification decision to demonstrate that it has met these four facial elements of section 401. Instead, certifying authorities may determine how to demonstrate compliance in response to a Federal agency inquiry about one of these aspects of its certification decision. Because certifying authorities are the entities most familiar with their certification process, certifying authorities, and not EPA or other Federal agencies, are in the best position to determine how to demonstrate compliance with these four section 401 facial elements.

EPA does not anticipate that such demonstrations will be burdensome. As the court noted in *City of Tacoma*, Federal agencies only need "to obtain some minimal confirmation of such compliance." 460 F.3d at 68. For example, the certifying authority may choose to demonstrate that it provided public notice either by including a copy of the public notice with the certification or by including an attestation statement that public notice occurred. Similarly, a certifying authority may choose to demonstrate that it acted within the reasonable period of time by providing documentation of the date the certifying authority received the request for certification and documentation of the date it furnished the project proponent with a decision. A certifying authority may also choose to demonstrate that it is the proper certifying authority by providing location information, such as a map, demonstrating the discharge will originate in its jurisdiction.

This sort of documentation should satisfy Federal agency review in most instances.

EPA is requesting comment on its proposed approach, including examples of how a certifying authority could demonstrate that it met the section 401 facial requirements. In addition, EPA requests comment on alternative approaches whereby the Agency might identify in regulation different elements of a certification decision that might be appropriate for Federal agency review, or whether EPA should defer to Federal agencies to define those elements appropriate for them to review.

3. Consequences of Federal agency review

The Agency is proposing to clarify the consequences of Federal agency review. If a Federal agency reviews a section 401 certification decision and determines it was not issued within the reasonable period of time, the Federal agency may determine that a waiver has occurred (or alternatively, may extend the reasonable period of time up to the one year statutory maximum). If the Federal agency determines that the statutory one year maximum has passed, the Federal agency may determine that a waiver has occurred. As discussed in section V.G in this preamble, a Federal agency may determine that a constructive waiver has occurred only if a certifying authority fails to take one of the four decisions described in this proposal within the reasonable period of time. Consistent with the 1971 Rule and 2020 Rule, the Agency is proposing to reaffirm that a waiver of certification occurs if the certifying authority fails to act within the reasonable period of time. *See* 40 CFR 121.9(a)(2)(i), 40 CFR 121.16(b) (2019). Similar to the approach in the 2020 Rule, the Agency is proposing to retain regulatory text describing how the Federal agency must communicate its waiver determination to the project proponent and certifying authority. *See* 40 CFR 121.9(c). If a Federal agency determines that the certification decision was not issued within the reasonable period of time, the Federal agency shall notify the certifying authority and project proponent in writing that a waiver has occurred. Similar to the 2020 Rule, *see* § 121.9(d), the Agency is also proposing to retain regulatory text that clarifies that such notification from the Federal agency satisfies the project proponent's

obligations under section 401.

Consistent with this approach, EPA is also proposing targeted conforming revisions to its part 124 and part 122 regulations, where these regulations allow EPA to find that a certifying authority waived its right to certify or waived a certification condition for reasons other than those specified in proposed § 121.8 (failure to act on a request for certification within the reasonable period of time). EPA is proposing to delete 40 CFR 124.53(e), which allows EPA to waive certification conditions that do not meet the requirements of § 124.53(e)(2) or (3). EPA is also proposing to delete § 124.53(e) because its approach to the contents of certification differs from proposed § 121.7, as explained in at the end of preamble section V.F.4. EPA is also proposing to revise 40 CFR 124.55(c), which allows EPA to waive certification conditions or denials that are based on State law allowing a less stringent permit condition. EPA is proposing to delete the second sentence of § 124.55(c), which allows EPA to waive a certification denial or condition, but the first sentence would not be affected by this proposal. EPA is proposing to revise 40 CFR 122.44(d)(3), which allows EPA to waive certifications that are stayed by a court or state board under certain circumstances. EPA proposing to delete the second and third sentences, which concern certification waiver. EPA intends that certification waivers for EPA-issued NPDES permits be governed by the certification waiver requirements in part 121.

The Agency recognizes that a constructive waiver is a severe consequence; as discussed in section V.G in this preamble, a waiver means the Federal license or permit may proceed without any input from the certifying authority. EPA encourages Federal agencies, project proponents, and certifying authorities to communicate early and often to prevent inadvertent waivers due to passage of time. If Federal agency review reveals that a certifying authority has inadvertently failed to act within the reasonable period of time, EPA encourages Federal licensing and permitting agencies to extend the reasonable period of time (provided it does not exceed one year from the receipt of the certification request) to allow certifying authorities an

opportunity to make a certification decision.[48] Providing this opportunity would be consistent with cooperative federalism principles central to section 401 while respecting the statute's clear direction that the reasonable period of time may not exceed one year from the receipt of a request for certification. 33 U.S.C. 1341(a)(1).

Aside from providing that a waiver occurs if the certifying authority does not act within the reasonable period of time, the statute does not provide direction on what should occur if a certifying authority fails to meet the other facial requirements in section 401. As discussed earlier, the legislative history indicates that Congress added the waiver provision to prevent "sheer inactivity" by a certifying authority from holding up the licensing or permitting process. *See* H.R. Rep. No. 91-940, at 54-55 (March 24, 1970) (Conf. Report). Consistent with the statutory language and legislative history, EPA believes that Congress intended such an extreme outcome only in situations where certifying authorities fail or refuse to make a decision, and not where a certifying authority, otherwise attempting to make a timely decision, fails to comply with other facial requirements of section 401. Case law also provides support for the Federal agency asking the certifying authority to either demonstrate that its decision meets section 401's facial requirements or remedy the situation instead of deeming any such failure an automatic waiver of certification. *See City of Tacoma*, 460 F.3d at 68-69 ("FERC should seek an affirmation from Ecology that it complied with state law notice requirements when it issued its water quality certification or, if it did not, that it has done so in response to this decision.").

If a Federal agency determines that a section 401 certification decision does not meet the certifying authority's public notice procedures, pursuant to proposed § 121.9(b), the Federal agency must notify the certifying authority of the deficiency and provide the certifying authority with an opportunity to remedy the noted deficiency. If necessary, the Federal agency must extend

[48] Allowing certifying authorities to remedy deficiencies if there is time remaining in the reasonable period of time is consistent with EPA's position in the joint memo with the Army addressing Corps permits. U.S. EPA and Department of the Army, Clean Water Act Section 401 Certification Implementation Memorandum, at 6 (August 19, 2021).

the reasonable period of time to provide the certifying authority with an opportunity to remedy the deficiency, but the reasonable period of time may not exceed one year from the receipt of the certification request.

If Federal agency review reveals that the wrong certifying authority issued the certification, EPA recommends that the Federal agency notify the project proponent that it must seek certification from the appropriate certifying authority before the Federal license or permit may be issued. As noted above, section 401 requires a project proponent to seek certification from the jurisdiction in which the discharge originates or will originate. 33 U.S.C. 1341(a)(1). Therefore, it is incumbent on the project proponent to identify and seek certification or waiver from the proper certifying authority before it may obtain a Federal license or permit.

If a Federal agency determines that a section 401 certification decision does not clearly indicate whether it is a grant, grant with conditions, denial, or express waiver, pursuant to proposed § 121.9(b), the Federal agency must notify the certifying authority of the deficiency and provide the certifying authority with an opportunity to remedy it. Under EPA's proposed rulemaking, if necessary, the Federal agency must extend the reasonable period of time to provide the certifying authority with an opportunity to remedy the deficiency, subject to the caveat that the reasonable period of time may not exceed one year from the receipt of the certification request. EPA expects that a certifying authority would be able to clarify its intended decision for the Federal agency upon request.

EPA is requesting comment on whether the Agency should develop procedures regarding how a certifying authority should respond to a Federal agency's notice regarding deficiencies in its certification decision. For example, should EPA provide a timeframe for the certifying authority to affirmatively respond to the Federal agency's notice of deficiency and provide a justification for any extension to the reasonable period of time (e.g., length of the public notice period)? EPA also is requesting comment on all aspects of its proposed rulemaking regarding Federal agency review and its understanding of the potential consequences of Federal agency

review.

H. EPA's Roles under Section 401

Section 401 identifies a number of specific roles for EPA. First, EPA acts as the certifying authority on behalf of states or tribes that do not have "authority to give such certification." 33 U.S.C. 1341(a)(1). Second, EPA is responsible for notifying other states or authorized tribes that may be affected by a discharge from a federally licensed or permitted activity, and where required, for providing an evaluation and recommendations on such other state or authorized tribe's objections. *Id*. at 1341(a)(2). Lastly, EPA is responsible for providing technical assistance upon request from Federal agencies, certifying authorities, or Federal license or permit applicants. *Id*. at 1341(b). This section focuses on EPA's role as a certifying authority and in providing technical assistance. EPA's role under section 401(a)(2) is discussed in detail in section V.K in this preamble.

1. EPA's Role as a Certifying Authority

EPA is proposing to revise the part 121 regulations to provide greater clarity about EPA's process when it acts as the certifying authority. Pursuant to section 401 of the CWA, EPA acts as the certifying authority on behalf of states or tribes that do not have "authority to give such certification." 33 U.S.C. 1341(a)(1). The 1971 Rule required EPA to provide certification in two scenarios: first, where EPA promulgated standards pursuant to section 10(c)(2) of the 1970 Water Quality Improvement Act; and second, where water quality standards have been established, but no state or interstate agency has authority to provide certification. 40 CFR 121.21 (2019). As discussed in section IV.A in this preamble, the 1971 Rule was promulgated prior to the enactment of the 1972 CWA amendments; as a result, the language in the 1971 Rule regarding EPA as a certifying authority does not reflect the amended text of section 401. In the 2020 Rule, EPA updated this provision with new regulatory text that indicates that EPA provides certification consistent with the 1972 statutory text and notes that EPA is required to comply with part 121 when it acts as a certifying authority. 40 CFR 121.13.

EPA is proposing minor, conforming modifications to current § 121.13(a) and (b). Specifically, consistent with the language in section 401(a)(1), the Agency is proposing to reaffirm that EPA is required to provide certification where no state, tribe, or interstate agency has the authority to provide certification or a waiver. *See* proposed § 121.16(a). The Agency is also proposing to reaffirm that, when it acts as a certifying authority, EPA must comply with both section 401 and the proposed requirements in part 121. *See* proposed § 121.16(b). Alternatively, EPA is requesting comment on whether it needs to clarify in regulatory text the circumstances under which it would act as a certifying authority, or whether the statutory language is clear enough that it "speaks for itself."

Currently, EPA acts as the certifying authority in two scenarios: (1) on behalf of tribes without "treatment in a similar manner as a state" (TAS) and (2) on lands of exclusive Federal jurisdiction. In the first scenario, if a tribe does not obtain TAS for section 401, EPA acts as the certifying agency for any federally licensed or permitted activity that may result in a discharge that originates in Indian country lands. As discussed in section V.L in this preamble, a tribe may obtain TAS for section 401 for the purpose of issuing water quality certifications. When EPA certifies on behalf of tribes without TAS, its actions as a certifying authority are informed by its tribal policies and the Federal trust responsibility to federally recognized tribes. EPA's 1984 Indian Policy, recently reaffirmed by EPA Administrator Regan, recognizes the importance of coordinating and working with tribes when EPA makes decisions and manages environmental programs that affect Indian country. *See* EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984), available at https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf; *see also* Memorandum from Michael S. Regan to All EPA Employees, Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy (September 30, 2021), available at https://www.epa.gov/system/files/documents/2021-09/oita-21-000-6427.pdf. This includes coordinating and working with tribes on whose behalf EPA reviews and acts upon requests for

certification on federally licensed or permitted projects.

In the second scenario, EPA acts as the certifying authority in situations where the Federal Government has exclusive jurisdiction over certain lands. Exclusive Federal jurisdiction is obtained in multiple ways, including (1) where the Federal Government purchases land with state consent to jurisdiction, consistent with article 1, section 8, clause 17 of the U.S. Constitution; (2) where a state chooses to cede jurisdiction to the Federal Government; and (3) where the Federal Government reserved jurisdiction upon granting statehood. *See Collins v. Yosemite Park Co.*, 304 U.S. 518, 529-30 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-42 (1937); *Surplus Trading Company v. Cook*, 281 U.S. 647, 650-52 (1930); *Fort Leavenworth Railroad Company v. Lowe*, 114 U.S. 525, 527 (1895). It is important to note that lands of exclusive Federal jurisdiction do not include lands where the Federal Government and a state, tribe, or interstate agency share jurisdictional responsibility.

While 16 U.S.C. Chapter 1 identifies multiple national parks as lands of exclusive Federal jurisdiction,[49] EPA does not maintain a map or list delineating all lands of exclusive Federal jurisdiction. In the preamble to the 2020 Rule, EPA noted that the number and extent of lands under exclusive Federal jurisdiction are subject to change and stated that it is the obligation of the project proponent to determine the identity of the appropriate certifying authority when seeking section 401 certification. 85 FR 42270 (July 13, 2020). Because such status is subject to change, EPA is not proposing to provide an exclusive list of lands subject to exclusive Federal jurisdiction. However, EPA is considering development of guidance to help stakeholders identify such areas. EPA is requesting comment on whether it should attempt to provide a list of lands subject to exclusive Federal jurisdiction or whether there are other examples or categories of lands of exclusive Federal jurisdiction that EPA should recognize, aside from the national parks

[49] These appear to include Denali National Park and Preserve, Yellowstone National Park, Yosemite National Park, Sequoia National Park, Crater Lake National Park, Glacier National Park, Rocky Mountain National Park, Mesa Verde National Park, Lassen Volcanic National Park, Great Smoky Mountains National Park, Mammoth Cave National Park, and Isle Royale National Park.

identified in 16 U.S.C. Chapter 1, as lands of exclusive Federal jurisdiction.

Consistent with the 2020 Rule, under this proposal, when EPA acts as the certifying authority, it is subject to the same requirements as other certifying authorities (*e.g.*, reasonable period of time to act on a request for certification) under section 401 and 40 CFR 121. In contrast to the 2020 Rule, this proposal does not retain the request for additional information provisions included in § 121.14 when EPA is the certifying authority. Under the 2020 Rule, EPA introduced limits on EPA's ability, as a certifying authority, to request additional information from a project proponent once the reasonable period of time began. These provisions include a requirement that EPA must initially request additional information within 30 days of receiving a request for certification and limitations on the type and scope of additional information EPA may request. 40 CFR 121.14(a)-(c). Additionally, the 2020 Rule requires EPA to provide the project proponent with a deadline to respond to request for additional information and acknowledges that a project proponent's failure to provide additional information neither extends the reasonable period of time, nor prevents EPA from acting on the request for certification. *Id*. at § 121.14(d)-(e).

EPA proposes to remove § 121.14 in its entirety because it finds these provisions not conducive to an efficient certification process for several reasons. The preamble to the 2020 Rule stated that it was "reasonable to assume that Congress intended some appropriate limits be placed on the timing and nature of such requests [for additional information]" because of the overarching statutory timeline. 85 FR 42271. Yet, neither the 2020 Rule preamble nor its regulatory text articulates how a 30-day limitation on EPA's initial request for additional information is compelled or even consistent with the statutory limitation that a certifying authority must act within a reasonable period of time. Although it is ideal for EPA to have relevant information to inform its analysis early in the reasonable period of time, various questions or needs may arise later in the review process that are critical to EPA acting on a request for certification. There is nothing in the statutory language that compels or even suggests

that EPA should have a limited ability to use the reasonable period of time to request additional information to evaluate a request for certification and make a fully informed decision. If the Agency is limited in its ability to request additional information to inform its decision, it may need to deny a request for certification instead of utilizing the additional information to possibly grant certification. Such an outcome would unnecessarily impede the Federal license or permitting process.

The current regulatory language also unnecessarily injects ambiguity into the certification process. Section 121.14(b) limits requests for additional information to that which is "directly related to the discharge", while § 121.14(c) limits requests only to information than can be "collected or generated within the reasonable period of time." Yet neither phrase is defined nor explained in the preamble or regulatory text to the 2020 Rule which introduces uncertainty into what kind of information EPA could actually request. Furthermore, the statutory language and this proposal already place a number of limitations on all certifying authority decisions. As proposed in § 121.7(b), all certifying authorities, including EPA, must act within the reasonable period of time and within the scope of certification. EPA finds that these proposed regulatory requirements are sufficient to ensure the Agency will act on requests for certification in a timely and appropriate manner.

Consistent with the Agency's proposal to remove the aforementioned limitations on EPA's ability to request additional information, EPA is also proposing to remove the provisions at § 121.14(d) and (e), which discuss how EPA and project proponents must respond to requests for additional information or lack thereof. The Agency is requesting comment on whether EPA should provide, either through guidance or in regulation, its expectations regarding communication with project proponents when EPA is a certifying authority.

EPA is proposing to retain and update the provision regarding the certification public notice and hearing process when EPA is the certifying authority, currently located at § 121.15. The statutory language of section 401(a)(1) requires states and interstate agencies to establish

procedures for public notice and hearings. The D.C. Circuit has held that certifying authorities have an obligation to provide public notice on certification requests. *See City of Tacoma*, 460 F.3d at 67-68. The 1971 Rule stated that EPA could provide public notice either by mailing notice to state and local authorities, state agencies responsible for water quality improvement, and "other parties known to be interested in the matter" (including adjacent property owners and conservation organizations), or, if mailed notice is deemed "impracticable," by publishing notice in a newspaper of general circulation in the area where the activity is proposed. 40 CFR 121.23 (2019). With regard to hearings, the 1971 Rule provided that the Regional Administrator with oversight for the area of the proposed project has discretion to determine that a hearing is "necessary or appropriate," and that "[a]ll interested and affected parties" would have reasonable opportunity to present evidence and testimony at such hearings. *Id*. EPA updated this provision in the 2020 Rule to expand the scope of possible parties that may receive notice to avoid unintentionally narrowing the list of potentially interested parties. 85 FR 42271. Additionally, under the 2020 Rule, EPA has placed a timeframe on when the Agency must provide public notice following receipt of a certification request and retained discretion to provide for a public hearing as necessary or appropriate. *Id; See* 40 CFR 121.15.

In proposed § 121.17, EPA is proposing to retain the public notice provision from the 2020 Rule with revisions to facilitate participation by the broadest number of potentially interested stakeholders and clarify that following such public notice, the Administrator shall provide an opportunity for public comment. The 1971 Rule allowed the Agency to either provide notice to a list of possible interested parties through mail, including adjacent property owners and heads of state agencies responsible for water quality improvement, or provide notice in a "newspaper of general circulation in the area in which the activity is proposed to be conducted." 40 CFR 121.23 (2019). As mentioned previously, the 2020 Rule removed this 1971 Rule provision that may have unintentionally narrowed the list of stakeholders who may wish to receive notice on projects seeking certification. However, the 2020 Rule defines an appropriately

broad list of potentially interested stakeholders (e.g., parties known to be interested in the proposed project). *See* 40 CFR 121.15(a). Additionally, the 1971 Rule limited the means for providing public notice to mail and newspaper circulation and may also unintentionally limit access to notice on such projects, particularly as stakeholders increasingly rely more on digital means of communication. Accordingly, EPA is proposing in § 121.17 to provide public notice on receipt of a request for certification and broader public participation by not specifying the particular manner(s) in which that notice will occur. Aligning with the commitment to empower communities, protect public health and the environment, and advance environmental justice in Executive Orders 13990 and 12898, the proposal allows for outreach designed to reach all potentially interested stakeholders, including population groups of concern (*e.g.*, minority and low-income populations as specified in Executive Order 12898 and indigenous peoples, as identified in EPA technical guidance[50] as a population group of concern. The Agency encourages doing so by using all appropriate means and methods. This proposed approach will allow EPA greater flexibility to address on a case-by-case basis specific issues regarding notice, such as broadband access issues and requirements for regional publications. Additionally, EPA is not proposing to provide in regulatory text an exhaustive list or examples of potentially interested parties to avoid unintentionally excluding some interested stakeholders on that list. EPA generally believes those stakeholders to whom it is appropriate to provide public notice may include state, tribal, county, and municipal authorities, heads of state agencies responsible for water quality, adjacent property owners, and conservation organizations. EPA is requesting comment on whether it should specify in regulatory text a list of stakeholders to whom notice of a certification request should be given.

Second, EPA is proposing to provide public notice within 20 days following receipt of a

[50] EPA's Technical Guidance for Assessing Environmental Justice in Regulatory Action identifies population groups of concern including indigenous peoples and group as those identified under E.O. 12898 (minority and low-income populations) as well as sub-populations that may be at greater risk for experiencing adverse effects, including those that rely on fish/wildlife for subsistence, age groups, and gender groups (p. 6).

certification request. The 1971 Rule did not set a time frame for EPA's public notice after receiving a certification request. In contrast, the 2020 Rule states that EPA would provide public notice 20 days from receipt of a certification request. In EPA's view, continuing to provide a time frame for EPA's issuance of public notice following a receipt of a certification request will contribute to better accountability, transparency, and certainty with respect to EPA's handling of certification requests. Generally, EPA views it will be able to provide public notice within the proposed timeframe. EPA finalized an identical timeframe under the 2020 Rule, which it has been able to meet without difficulty in most instances. EPA is requesting comment on whether this 20-day time frame is reasonable, whether EPA should provide notice sooner or later, or whether it is even necessary to provide a time frame in regulatory text.

EPA is proposing that once the Administrator provides public notice on receipt of a request for certification, the Administrator must provide an opportunity for public comment. EPA is not proposing to define the length of the public comment period. Rather, EPA believes the appropriate timeframe for comment is more appropriately determined on a case-by-case basis, considering project-specific characteristics. In general, EPA anticipates a 30-day comment period; however, comment periods as short as 15 days or as long as 60 days may be warranted in some cases, based on the nature of the project.

EPA may also hold a public hearing after it provides public notice on receipt of a request for certification. EPA is proposing to retain with minor modifications the public hearing provision currently located at § 121.15(b). For context, the 1971 Rule provided that the Regional Administrator may hold a public hearing at their discretion. 40 CFR 121.23 (2019). Although "[a]ll interested and affected parties" have the opportunity to present evidence and testimony at a public hearing, the scope of the hearing is limited to the question of "whether to grant or deny certification." *Id*. The 2020 Rule carries forward the position that the Agency has discretion to determine whether a public hearing is necessary or appropriate; however, the 2020 Rule removes the limitation on the subject matter of the public hearing. Consistent with the 2020 Rule, under §

121.17(b) of this proposal, stakeholder input at public hearings may cover any relevant subject matter on the proposed project to best inform EPA as it makes its certification decision. EPA is requesting comment on the proposed public hearing provision in general.

The Agency is also providing further insight on its plans to incorporate environmental justice into its role as a certifying authority. As discussed in section IV in this preamble, the Agency intends for this proposal to address essential water quality protection policies identified in Executive Order 13990, including environmental justice. In addition to the policy directive from Executive Order 13990, other Executive orders emphasize the importance of advancing environmental justice in Federal agency actions. *See* E.O. 12898, 59 FR 7629 (February 11, 1994) (directing agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations in the United States), E.O. 14008, 85 FR 7619 (January 27, 2021) (expanding on the policy objectives established in E.O. 12898 and directing Federal agencies to develop programs, policies, and activities to address the disproportionately high and adverse human health environmental, climate-related and other cumulative impacts on vulnerable, historically marginalized, and overburdened communities, as well as the accompanying economic challenges of such impacts).[51]

Consistent with these directives and EPA technical guidance, when EPA acts as a certifying authority, the Agency should consider impacts on minority, low-income, indigenous communities who disproportionately bear the burdens of environmental pollution and hazards. In considering impacts from a federally licensed or permitted project, water quality related impacts on population groups of concern are issues that fall within the relevant scope of analysis and should inform decision-making on requests for certification. Specifically, the Agency intends to

[51] The Agency also finalized and published the fiscal year (FY) 2022-2026 EPA Strategic Plan in March 2022, which includes new environmental justice strategic goals and emphasis to be embedded in all EPA work. *See* https://www.epa.gov/planandbudget/strategicplan.

consider the extent to which the "activity as a whole" or any discharge may cause water quality-related effects with the potential to impact population groups of concern. Additionally, as discussed above, the Agency finds that broadening the public notice provision will provide communities seeking to advance environmental justice with greater opportunities to inform the certification process. The Agency invites comment on ways the Agency can further incorporate environmental justice and related concerns into its certification process, including whether the Agency should develop any regulatory text to this effect.

2. EPA's Role as a Technical Advisor

Section 401(b) provides certifying authorities, project proponents, and Federal agencies with the ability to ask EPA for technical advice on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and any methods to comply with such limitations, standards, regulations, requirements, or criteria. *See also* H.R. Rep. No. 92-911, at 124 (1972) ("The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements, or criteria, but only upon the request of a State, interstate agency, or Federal agency."). The 1971 Rule acknowledged this role but limited it to provision of technical advice on water quality standards. 40 CFR 121.30 (2019). In the 2020 Rule, the Agency modified this provision to expand the scope of technical advice and assistance EPA might provide to better align with the statutory text. 85 FR 42274-75 (July 13, 2020).

Therefore, consistent with the scope of section 401(b), EPA is proposing to revise the regulatory text currently at § 121.16 to reflect the statutory text more directly. Under this proposal, EPA shall provide technical advice, upon request by a Federal agency, certifying authority, or project proponent, on (1) applicable effluent limitations, or other limitations, standards (including water quality standards such as water quality criteria), regulations, or requirements, and (2) any methods to comply with such limitations, standards, regulations, or requirements. *See* proposed § 121.18. Federal agencies, certifying authorities, and project

proponents may request EPA's technical assistance at any point in the certification process.

EPA does not intend this proposal to give EPA the authority to make certification decisions for states and authorized tribes, or to independently review state or tribal certifications or certification requests. *See* H.R. Rep. 92-911, at 124 (1972) ("The Committee notes that a similar provision in the 1970 Act has been interpreted to provide authority to the Administrator to independently review all State certifications. This was not the Committee's intent. The Administrator may perform services of a technical nature, such as furnishing information or commenting on methods to comply with limitations, standards, regulations, requirements or criteria, but only upon request of a State, interstate agency or Federal agency."). Nor does the Agency consider its role under section 401(b) to include providing monetary or financial support to certifying authorities in implementing their section 401 programs. The Agency observes that there are other means for certifying authorities to seek financial assistance for their water quality certification programs (*e.g.*, CWA section 106 grants). The Agency requests comments on whether any additional procedural steps should be described in regulatory text, such as the manner in which certifying authorities, Federal agencies, and project proponents may request technical assistance.

I. Modifications

The Agency is proposing to reintroduce a certification modifications provision. Prior to the 2020 Rule, the Agency's longstanding 1971 Rule allowed certification modifications to occur after a certification is issued, provided the certifying authority, Federal agency, and the EPA Regional Administrator agree to the modification. 40 CFR 121.2(b) (2019). In response to stakeholder recommendations and pre-proposal input to allow certification modifications, the Agency is proposing a process similar to the 1971 Rule that allows a certifying authority to modify a certification after reaching an agreement to do so with the Federal licensing or permitting agency (but not EPA).

CWA section 401 does not expressly authorize or prohibit modifications of certifications;

nor does it preclude the certifying authority from participating in the licensing or permitting process after the issuance of a certification. *See* 33 U.S.C. 1341(a)(3)-(a)(5).

In a significant change from prior practice, the 2020 Rule removes the 1971 Rule's modification provision in its entirety and shifts the obligation to define when certification modifications are allowed to the Federal licensing or permitting agency. 85 FR 42278 (July 13, 2020). However, the 2020 Rule does not interpret the statutory silence in section 401 as prohibiting all modifications. Rather, the 2020 Rule preamble asserts that section 401 does not provide EPA an oversight role in the modification process or authorize "unilateral" modifications by certifying authorities. *Id*. The 2020 Rule preamble acknowledges that certification modifications could occur through other mechanisms (*e.g.*, as provided in other Federal regulations), and encourages Federal agencies to establish procedures in regulation "to clarify how modifications would be handled in these specific scenarios." *Id*. at 42279.

Beyond modifications to existing certifications, the 2020 Rule preamble also suggests there might be circumstances that warrant the submission of a *new* request for certification, such as "if certain elements of the proposed project (e.g., the location of the project or the nature of any potential discharge that may result) change materially after a project proponent submits a certification request." *Id*. at 42247. The Agency declined to identify in the 2020 Rule itself specific circumstances that might warrant the submission of a new certification request. After promulgation of the 2020 Rule, the Agency did not issue any further guidance on which situations warranted a new certification request (as opposed to modification of the existing certification through other Federal agency processes).

In its 2021 *Federal Register* document, EPA expressed concern "that the [2020 Rule's] prohibition of modifications may limit the flexibility of certifications and permits to adapt to changing circumstances." 86 FR 29544. Stakeholders have expressed similar concerns, noting that minor changes may occur in the project that may not rise to a level that requires a new certification (*e.g.*, needing to extend the certification's "expiration" date to match a permit

extension, or shifting the certified "work window" to reduce the amount of work occurring during high-flow periods), but may be significant enough to warrant a modification of the certification. During pre-proposal outreach, certifying authorities, project proponents, and non-governmental organizations expressed support for a certification modification process that balances transparency and an ability to adapt to new information. While some project proponents requested flexibility to adapt to changing circumstances, they noted that any rulemaking should limit unilateral actions a certifying authority may take to modify a certification after issuance.

In response to stakeholder recommendations to allow certification modifications, the Agency is proposing a process similar to the 1971 Rule that allows a certifying authority to modify a previously granted certification (with or without conditions) after reaching an agreement to do so with the Federal licensing or permitting agency. *See* proposed § 121.10.

The proposed approach is also consistent with section 401's temporal limitations on when a certifying authority may act on a certification request. The statute requires a certifying authority to act on a request for certification within a reasonable period of time not to exceed one year. 33 U.S.C. 1341(a)(1). As discussed in section V.F in this preamble, the Agency interprets the term "to act on a request for certification" to mean the certifying authority must make a decision to grant, grant with conditions, deny, or expressly waive certification. Under this proposed rulemaking, a certification modification could occur after the reasonable period of time in which the original certification decision was made.[52] The Agency does not view allowing such modifications as contrary to the text of, or Congressional intent supporting, the reasonable period of time limitation. First, on its face, the reasonable period of time limitation only applies to the certifying authority's action on the request for certification. The statute is silent regarding whether it also applies to modifications. Second, in imposing the reasonable period of time limitation, Congress was concerned by the potential for the certifying authority's "sheer

[52] *See* discussion of reasonable period of time in section V.D in this preamble regarding extensions of the reasonable period of time, not to exceed one year from receipt of the request for certification.

inactivity" to delay the project. *See* H.R. Rep. 92-911, at 122 (1972). That concern is not present with modifications because the certifying authority will have already acted on the request. Moreover, the Agency's proposal requires that the Federal agency also agree to initiate the modification process.

EPA intends that, as used here, a modification means a change to an element or portion of a certification or its conditions; it does not mean the wholesale reversal of a certification decision. For example, if a certifying authority has previously waived certification, that waiver may not be modified because there would be no "certification" to modify. Thus, a certifying authority may not "modify" a waiver by changing it into a grant, a grant with conditions, or a denial. Similarly, a denial of certification cannot be modified into a grant (with or without conditions) of certification. Furthermore, under this proposed rulemaking, a previously granted certification (with or without conditions) cannot be converted into a waiver or denial of certification because EPA considers a modification to be a change to an element or portion of a certification, not a reconsideration of the decision whether to certify. Constraining certifying authorities from fundamentally changing their certification action (*e.g.*, changing a grant into a denial or vice versa) through a modification process recognizes reliance interests and promotes regulatory certainty. Further, EPA has concerns that changing the fundamental nature of the certification action (*e.g.*, change a grant, denial, or waiver to something entirely different) may be inconsistent with the Congressional admonition to act on a certification request within the statutory reasonable period of time.

The Agency is proposing that the ability to modify a certification be subject to two further limitations. First, similar to the 1971 Rule, the certifying authority and the Federal agency must agree in writing that a modification should be made. Second, the certifying authority may modify only those portions of the certification that the two parties agree should be modified. Both of these limitations are discussed below.

First, EPA is proposing that a modification may only occur where a Federal agency and

certifying authority agree in writing that the certification should be modified. The parties would have to agree that one or another part of the certification should be modified; they would not have to agree to the specific language of such modification. Unlike the 1971 Rule, the Agency is not proposing to include EPA in the certification modification process where the Agency is neither the certifying authority nor the Federal licensing or permitting agency. As noted in the 2020 Rule preamble, the statute does not expressly provide EPA with a role in the modification process, unlike the Agency's other roles under section 401.[53] *See* 85 FR 42278 (July 13, 2020). Additionally, although the 1971 Rule provides the Agency with an oversight role in the modification process, the preamble to the 1971 Rule does not explain why the Agency was given such a role. *See* 36 FR 8563-65 (May 8, 1971). As such, the Agency does not see the need for such a role now, especially where EPA was not involved in the original certification decision and is not the relevant Federal permitting agency. EPA is proposing that it should not have an oversight role in the certification modification process. Consistent with the 1971 Rule, the Agency is also not proposing to require that the project proponent agree to the modification. However, the Agency anticipates that project proponents may still play some part in the modification process (*e.g.*, notifying the certifying authority when it thinks a modification may be appropriate). The Agency is requesting comment on whether the regulations should provide project proponents with a more explicit and expansive role in the modification process.

Because the Agency is reintroducing a provision similar to the 1971 Rule's collaborative approach to modifications (albeit without EPA's involvement), the proposal would not allow for unilateral modifications by certifying authorities. This is consistent with the 2020 Rule. While the statutory language and legislative history appear to countenance a role for certifying authorities after a certification is issued, EPA does not think that role includes unilateral action to

[53] *See* section V.H in this preamble discussing EPA's specific roles identified in section 401, including acting as a certifying authority on behalf of jurisdictions lacking authority, notifying other jurisdictions where their water may be affected by a discharge from another jurisdiction, and providing technical assistance upon request.

modify a certification.[54] Rather, the certifying authority's actions under sections 401(a)(3)-(a)(4) depend on the existence of either a preceding or subsequent Federal agency action. *See* 33 U.S.C. 1341(a)(3)-(a)(4). The Agency does not view conditions in the original certification that require ongoing or future monitoring or modeling activities, including when paired with clearly defined adaptive management response actions, as unilateral certification modifications. Such conditions merely put project proponents and Federal agencies on notice at the time of certification that future adaptive management implementation actions might be needed.[55]

The Agency is not proposing to define the specific circumstances in which a Federal agency and certifying authority may agree to modify a certification. During the pre-proposal input period, stakeholders said they need more flexibility than the 2020 Rule provides for modifications such as correcting typographical errors, changing a point of contact, or adjusting a certification's expiration date. The Agency invites comment on other scenarios or reasons for certification modifications.

The last proposed limitation on a certification modification is that the certifying authority may only modify those portions of the certification that the Federal agency agrees may be modified. For example, if a Federal agency and certifying authority agree that a modification is necessary to fix a typographical error in the certification, the certifying authority may only modify that aspect of the certification. EPA recommends that the modification process be collaborative and that any modification be limited by the nature of the Federal agency and certifying authority's agreement. However, EPA is not suggesting that Federal agencies and certifying authorities must collaborate on the specific language of the certification modification.

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[54] *See* 33 U.S.C. 1341(a)(3)-(a)(4); *Keating v. Federal Energy Regulatory Comm'n,* 927 F.2d 616, 621-22 (D.C. Cir.1991) (summarizing section 401(a)(3)); *see also* 115 Cong. Rec. 9257, 9268-9269 (April 16, 1969) (discussing a hypothetical need for a state to take another look at a previously certified federally licensed or permitted activity where circumstances change between the issuance of the construction permit and the issuance of the operation permit).

[55] *See* section V.F for further discussion on the importance of certification conditions and adaptive management, particularly where future water quality-related impacts may occur due to climate change or other events.

Rather, EPA's proposal contemplates that the certifying authority and the Federal agency agreement would identify those portions of the certification decision that the certifying authority would modify, and then the certifying authority would be responsible for drafting the modification language. The Agency is requesting comment on an alternative approach whereby the actual language of the certification modification would be agreed upon by both the Federal agency and the certifying authority.

EPA is not proposing to place regulatory limitations on the point in time that certification modifications may occur. Rather, the Agency expects this proposal to provide the opportunity for certification modification at any point after certification issuance, provided the Federal agency and the certifying authority agree to make the modification. EPA is requesting comment on this approach. EPA is also requesting comment on whether, in the interest of finality and reliance, there should be a temporal limitation on the ability to modify certifications. EPA is also requesting comment on whether the certification modification process should account for 1) whether there is a Federal license or permit modification process already in place and 2) the point in time at which a modification may be made (e.g., if new information supporting a modification arises either before or after issuance of the final license or permit).

EPA is also proposing to delete 40 CFR 124.55(b), which describes the circumstances under which a modification may be made to a certification on an EPA-issued NPDES permit. The approach to modifications in § 124.55(b) differs significantly from the approach proposed at § 121.10. In many respects, it is more limited. For instance, § 124.55(b) allows modifications after permit issuance only at the request of the permittee and only to the extent necessary to delete any conditions invalidated by a court or appropriate state board or agency. In one way, it is broader because it does not require EPA as the Federal permitting agency to agree to the modification. EPA intends for all certification modifications, including for EPA-issued NPDES permits to follow the approach discussed above and proposed at § 121.10. EPA is requesting comment on whether it should allow a certifying authority to unilaterally modify any

certification, including but not limited to certifications for EPA-issued NPDES permits, in circumstances under which there is a change in State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate state board or agency stays, remands, or vacates a certification after license or permit issuance. *See* 40 CFR 124.55(b).

Given the pre-proposal stakeholder input and the Agency's experience with certification modifications, the Agency is proposing to reintroduce a modification process for certifications, provided the certifying authority and Federal agency agree that a modification is necessary. By proposing this collaborative and adaptive process, EPA expects that certifying authorities and Federal agencies (as well as project proponents) will have the flexibility they need to adapt to changing circumstances or new information, while recognizing the need to protect reliance interests and promote transparency.

J. Enforcement and Inspections

This section of the preamble discusses a number of issues that have arisen with respect to enforcement of the requirement to obtain CWA section 401 certifications and enforcement of certification conditions. The Agency is addressing these issues in response to stakeholder concern and confusion over how the 2020 Rule addresses CWA section 401 enforcement. EPA is not proposing to retain any regulatory text regarding enforcement of the requirement to obtain section 401 certification or enforcement of certification conditions.[56] Nevertheless, in light of the significant pre-proposal input EPA received on this issue, EPA will discuss some of the more common concerns that have been identified regarding enforcement of the requirement to obtain section 401 certification and enforcement of certification conditions and seek further comment and input from stakeholders. To be clear, EPA is not offering new interpretations or positions on most of the issues discussed below. EPA does, however, invite comment on whether any of the interpretations or positions or judicial holdings identified below should be expressed in

[56] EPA is proposing regulatory text regarding Federal agency review of certification decisions. *See* section V.G for further discussion.

regulatory language in the final rule, specifically the interpretations on the enforceability of certification conditions by Federal agencies and certifying authorities; the judicial holdings regarding the application of the CWA citizen suit provision to certifications and certification conditions; and the interpretation of the term "review" in CWA section 401(a)(4).

1. General enforcement issues

Section 401 contains three provisions directly relevant to enforcement. First, section 401(a)(4) provides certifying authorities with an opportunity, prior to operation, to inspect a certified federally licensed or permitted activity or facility that does not require a Federal operating license to assure its operation will not violate water quality requirement. 33 U.S.C. 1341(a)(4). If the certifying authority determines that the operation will violate applicable water quality requirements, the Federal agency may suspend the license or permit after a public hearing. *Id*. Second, section 401(a)(5) provides that any certified Federal license or permit may be "suspended or revoked" by the Federal agency "upon the entering of a judgment under [the CWA] that such facility or activity has been operated in violation" of the enumerated sections of the CWA. *Id*. at 1341(a)(5). Third, section 401(d) provides that certification conditions "shall become a condition on any Federal license or permit subject to the provisions of this section." *Id*. at 1341(d).

Of these three provisions, the 1971 Rule only included regulatory text on section 401(a)(4), as discussed below in the section on inspection authority. The 1971 Rule did not contain any regulatory provisions addressing section 401(a)(5) or section 401(d) (the latter of which was not added to the statute until the 1972 amendments). The 2020 Rule addresses section 401(d) and section 401(a)(4). Regarding section 401(d), the 2020 Rule states that the Federal agency "shall be responsible for enforcing certification conditions" incorporated into its license or permit. Regarding section 401(a)(4), the 2020 Rule allows the pre-operation inspection under section 401(a)(4) of all certified projects, regardless of whether they had received a subsequent Federal operating license or permit. *See* 85 FR 42275-76. The 2020 Rule preamble also stated

that the "CWA does not provide an independent regulatory enforcement role for certifying authorities," *id*. at 42275, and declined to finalize an interpretation regarding CWA section 505 citizen suits and section 401. *Id.* at 42277.

In EPA's notice of intent to revise the 2020 Rule, EPA requested stakeholder feedback on several enforcement related issues, including "the roles of federal agencies and certifying authorities in enforcing certification conditions, whether the statutory language in CWA Section 401 supports certifying authority enforcement of certification conditions under federal law, whether the CWA citizen suit provision applies to Section 401, and the rule's interpretation of a certifying authority's inspection opportunities." 86 FR 29543 (June 2, 2021). In pre-proposal input, stakeholders generally agreed that Federal agencies could enforce certification conditions. However, stakeholders expressed concern that the 2020 Rule prevents states and tribes from exercising their independent enforcement authority and relied solely on Federal agencies to enforce certification conditions. Several stakeholders expressed concern that Federal agencies may not be willing or able to enforce certification conditions incorporated into their Federal licenses or permits due to resource limitations (*e.g.*, staff, funding, time). Conversely, a few stakeholders asserted that certifying authorities did not have an enforcement role either under section 401 or any other provision of the CWA, including section 505. Other stakeholders asserted that section 505 provided for citizen suit enforcement of both failures to obtain section 401 certification and failure to comply with certification conditions.

EPA observes that this proposal is generally focused on interpreting the text of section 401 itself, which does not directly address state or tribal enforcement authority. Consistent with the approach taken in the 2020 Rule, this rulemaking does not propose interpretations of other enforcement-related sections of the CWA, such as section 505. As such, the Agency is not inclined to propose regulatory text to address state or tribal enforcement authority with respect to section 401 or the CWA's citizen suit provision. Nevertheless, EPA invites comment on whether it should do so in the final rule and, if so, what regulatory language it should include.

The Agency views section 401 certification conditions that are incorporated into the Federal license or permit as enforceable by Federal licensing or permitting agencies. Section 401(d) provides that certification conditions "shall become a condition on any Federal license or permit." Because section 401 conditions become conditions of the Federal license or permit, the Federal agency may enforce any such conditions in the same manner as any other conditions of its license or permit. EPA expressed this interpretation in the 2020 Rule, 85 FR 42275-76, and a decade prior to that rulemaking. *See*, *e.g.*, 2010 Handbook, at 32 (rescinded). EPA also observes that Federal agencies have considerable latitude in deciding whether and when to enforce requirements and conditions in their licenses and permits. *See Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (discussing why it is important for agencies to retain enforcement discretion).

The Agency has consistently taken the view that nothing in section 401 precludes states from enforcing certification conditions when so authorized under state law. In the 2020 Rule preamble, the Agency concluded that "[n]othing in this final [2020] rule prohibits States from exercising their enforcement authority under enacted State laws." EPA did, however, consider this authority limited to "where State authority is not preempted by federal law." 85 FR 42276. A decade prior to the 2020 Rule, EPA had already recognized that states enforce certification conditions when authorized to do so under state law. *See e.g.*, 2010 Handbook, p. 32-33 (rescinded) ("Many states and tribes assert they may enforce 401 certification conditions using their water quality standards authority."). EPA is not proposing to retain the regulatory text currently located at § 121.11(c) which expressly states that Federal agencies "shall be responsible" for enforcing certification conditions placed in the Federal license or permit. The regulatory text at § 121.11(c) introduces ambiguity into the Agency's longstanding position that nothing in section 401 precludes states from enforcing certification conditions when authorized under state law, and has led to stakeholder confusion over whether the 2020 Rule prevents states and tribes from exercising their independent enforcement authority and whether the 2020 Rule limited Federal agency discretion regarding their enforcement of section 401 conditions in their

permits.

With respect to CWA citizen suits and their application to section 401 certifications and conditions, the Agency observes that there is some case law discussing this issue. First, the Ninth Circuit Court of Appeals has held that citizen suits may be brought to enforce the requirement to obtain certification. *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998). In *Dombeck*, the court rejected the argument that section 505 authorizes only suits to enforce certification conditions but not the requirement to obtain a certification. The court pointed to the plain language of section 505, which cross-references the entirety of section 401 (and not, for example, only section 401(d), which concerns certification conditions). *Id.* Second, a few Federal courts have held that certification conditions can be enforced through CWA citizen suits. In *Deschutes River Alliance*, a U.S. district court considered the issue at length and ultimately held that CWA section 505 authorizes citizens to enforce certification conditions. *See Deschutes River Alliance v. Portland Gen. Elec. Co*., 249 F. Supp. 3d 1182, 1188 (D. Or. 2017). Relying in part on *Deschutes River Alliance*, another U.S. district court also considered the issue in depth and held that the CWA citizen suit provision provides citizens a cause of action to sue to enforce the conditions of a section 401 certification. *Pub. Emps. for Envtl. Responsibility v. Schroer*, No. 3:18-CV-13-TAV-HBG, 2019 WL 11274596, at *8-10 (E.D. Tenn. June 21, 2019). EPA is not aware of any Federal court that has considered the issue and reached the opposite conclusion.

EPA notes that *Deschutes River Alliance* also held that certifying states may enforce certification conditions via the CWA citizen suit provision. 249 F. Supp. 3d at 1191-92. The court reasoned that section 505 is the only provision of the CWA that could bestow Federal authority upon states to enforce certification conditions and, given this, interpreting section 505 to preclude state enforcement of certification conditions would run "contrary to the CWA's purpose and framework." *Id.* at 1191.

2. Certifying authority inspection authority

As discussed above, section 401(a)(4) identifies one set of circumstances where the

certifying authority may review the manner in which a facility or activity will operate once the facility or activity has received certification. 33 U.S.C. 1341(a)(4). The certifying authority's review is limited to determining if the post-construction operation of the facility or activity will ensure that applicable effluent limitations, other limitations, or other applicable water quality requirements will not be violated. Section 401(a)(4) further states that upon notification by the certifying authority that the operation or activity will violate effluent limits, other limits or other water quality requirements, the Federal agency, after public hearing, may suspend the license or permit and the license or permit shall remain suspended until there is reasonable assurance that the facility or activity will not violate CWA sections 301, 302, 303, 306 or 307. *Id*.

The 1971 Rule clarified that the ability to "review the manner in which the facility or activity shall be operated or conducted" meant the right to inspect a facility or activity, and that the inspection is limited to a situation where there was a construction license or permit and a subsequent operating license or permit was not required. The 1971 Rule set forth the procedure regarding inspection and subsequent inspection findings; however, these regulations only apply where EPA is the certifying authority. *See* 40 CFR 121.26-121.28 (2019). The 2020 Rule interprets section 401(a)(4) to apply to all certifying authorities. It also expands the ability to conduct inspections pursuant to section 401(a)(4) to any certified project where the license or permit and certification were issued prior to operation, instead of only for projects where there was a construction license or permit and a subsequent operating license or permit was not required. 40 CFR 121.11(a); 85 FR 42277. In pre-proposal input, several stakeholders pressed the Agency to allow for inspections before, during, and post-operation.

EPA thinks that the 2020 Rule incorrectly interprets the limited applicability of section 401(a)(4) and does not think the statutory language needs further clarification through rulemaking. Accordingly, EPA is proposing to remove § 121.11(a)-(b) in the current regulation. On its face, section 401(a)(4) applies to a limited circumstance where there is a Federal license or permit and certification issued *prior to* operation of the facility or activity and there is *not* a

subsequent Federal operating license or permit necessary for the facility or activity to operate. Under these limited circumstances, the statute is clear that the licensee or permittee must provide the certifying authority with the ability to "review" the facility or activity to determine whether it will comply with effluent limitations, other limitations, or other water quality requirements. EPA interprets the term "review" found in section 401(a)(4) to be broad enough to include inspection, but not necessarily limited to inspection. It can arguably also include the right to review preliminary monitoring reports or other such records that will assist the certifying authority in determining whether the operation of the facility or activity will comply with effluent limitations, other limitations, or other water quality requirements. EPA is requesting comment on whether it should articulate this interpretation of section 401(a)(4) in regulatory text.

EPA emphasizes that section 401(a)(4) does not necessarily limit the certifying authority's ability to inspect facilities or activities before or during operation in accordance with the certifying authority's laws and regulations. The Agency is aware that states and tribes may have their own authority to inspect a facility or activity to determine compliance with conditions set forth in a section 401 certification. Similarly, section 401(a)(4) does not necessarily limit a Federal agency's ability to inspect a facility during the life of the permit or license pursuant to that Federal agency's laws and regulations.

K. Neighboring Jurisdictions

Section 401(a)(2) establishes a process for "neighboring jurisdictions" to participate in the Federal licensing or permitting process in circumstances where EPA has determined that a discharge from an activity subject to certification from another jurisdiction "may affect" their water quality. EPA is revising the definition of the term "neighboring jurisdiction" to clarify that it includes "any state, or tribe with treatment in a similar manner as a state for CWA section 401 in its entirety or only for CWA section 401(a)(2), other than the jurisdiction in which the

discharge originates or will originate." *See* proposed § 121.1(i).[57] The current definition of "neighboring jurisdiction" located at § 121.1(i) inaccurately suggests that a neighboring jurisdiction may only include a state or TAS tribe that EPA determines may be affected by a discharge from another jurisdiction. However, a neighboring jurisdiction does not obtain its status as a neighboring jurisdiction based upon EPA's "may affect" determination. It instead obtains such status by being a jurisdiction other than the one where the discharge originates or will originate. Ultimately, a Federal license or permit may not be issued until the section 401(a)(2) process is complete.

To initiate the section 401(a)(2) process, a Federal licensing or permitting agency must "immediately" notify EPA when it receives a license or permit application and a section 401 certification. 33 U.S.C. 1341(a)(2). EPA then has 30 days from the date it receives that notification to determine whether a discharge from the activity may affect the water quality of a neighboring jurisdiction and, if so, to notify that neighboring jurisdiction, the licensing or permitting agency, and the project proponent.[58] After receiving notice from EPA, the neighboring jurisdiction has 60 days to determine whether the discharge "will affect" its water quality so as to violate its water quality requirements, and if so, object in writing to the issuance of the license or permit and request that the licensing or permitting agency conduct a hearing on its objection. *Id*. When the licensing or permitting agency conducts a hearing under section 401(a)(2), EPA must submit to the licensing or permitting agency an evaluation and

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[57] Tribes without TAS to administer section 401 or section 401(a)(2) are not neighboring jurisdictions for purposes of section 401(a)(2), as the statutory language limits the section 401(a)(2) process specifically to states. However, EPA is proposing a process for tribes to attain TAS specifically for administering a water quality certification program under section 401 and for administering only the section 401(a)(2) portion of a water quality certification program. *See* proposed § 121.11. Further, in the absence of TAS for either section 401 or 401(a)(2), tribes may participate in the public notice process for a section 401 water quality certification.

[58] *Fond du Lac Band of Lake Superior Chippewa v. EPA* determined that the statutory language of section 401(a)(2) does not allow EPA to decline to make a determination whether or not a discharge from the certified project may affect water quality in a neighboring jurisdiction, and further found that EPA's "may affect" determination is judicially reviewable under the APA. 519 F.Supp.3d 549, 565, 567 (D. Minn. 2021).

recommendations regarding the objection of the neighboring jurisdiction. In turn, section 401(a)(2) requires the licensing or permitting agency to condition the relevant license or permit "as may be necessary to insure compliance with applicable water quality requirements," based upon the recommendations of the neighboring jurisdiction and EPA, and any additional evidence presented at the hearing. If "the imposition of conditions cannot insure such compliance," the licensing or permitting agency shall not issue the license or permit. *Id*.

Section 401(a)(2) limits EPA to considering whether a "discharge" from an activity may affect the water quality of a neighboring jurisdiction, and likewise limits a neighboring jurisdiction to determining whether a "discharge" from the activity will affect its water quality so as to violate any water quality requirements. Accordingly, EPA interprets the scope of section 401(a)(2) as limited by the statutory language to considering potential effects only from a "discharge" from an activity.

Pre-proposal feedback relating to the process established in section 401(a)(2) reflected the need for more specificity regarding the roles of the Federal licensing or permitting agency, EPA, and the neighboring jurisdiction in the process, and the steps within the process. As a result, EPA is providing more detail and explanation in this proposal on the roles of each of these participants in the section 401(a)(2) process and the steps involved. Additionally, to promote consistency and efficiency, EPA is updating the 2020 Rule to provide greater clarity regarding how the section 401(a)(2) process is initiated and conducted.

1. Federal licensing or permitting agency's role in initiating the section 401(a)(2) process

CWA section 401(a)(2) requires that the Federal licensing or permitting agency, upon receipt of a license or permit application and the related section 401 water quality certification, immediately notify the EPA Administrator of such certification and application. 33 U.S.C. 1341(a)(2). The 1971 Rule established some procedural requirements for this process,[59] which EPA updated in 2020. The 2020 Rule includes additional specificity on the timing of Federal

[59] *See* 40 CFR part 121, subpart B (2019).

agency notification but did not contain a standardized process for notification. 40 CFR 121.12(a). Instead, the Agency relies on Federal agencies to develop notification processes and procedures that work within their licensing or permitting programs. 85 FR 42273.

The Agency is proposing to clarify what actions initiate the section 401(a)(2) process and when Federal agencies must provide notification to EPA under section 401(a)(2). Additionally, the Agency is proposing procedures for Federal agencies to follow when providing notification to EPA. Section 401(a)(2) provides that the Federal licensing or permitting agency must "immediately" notify the EPA Administrator upon receipt of an application and certification. 33 U.S.C. 1341(a)(2). Under the 1971 Rule, EPA's section 401(a)(2) review was initiated upon receipt of either a certification or a waiver, which was treated as a substitute for certification. *See* 40 CFR 121.11, 121.16 (2019). In the 2020 Rule, EPA's section 401(a)(2) review is initiated upon receipt of a certification. 40 CFR 121.12(a); *see* 85 FR 42287. As discussed below, EPA is proposing to return to the approach taken in the 1971 Rule at proposed § 121.12.

Although the statutory text does not explicitly identify waiver of certification as an action that initiates section 401(a)(2) review,[60] the Agency proposes that it is appropriate to treat the waiver of certification as a substitute for a grant of certification for purposes of section 401(a)(2) review for several reasons. First, this treatment is consistent with the purpose of section 401(a)(2). Section 401(a)(2) provides neighboring jurisdictions with an opportunity to object to federally licensed or permitted discharges originating in other jurisdictions, where they determine the discharge will violate their water quality requirements. A waiver does not indicate a certifying authority's substantive opinion regarding the water quality implications (for itself or another jurisdiction) of a proposed activity or discharge. Rather, a certifying authority may waive certification for a variety of reasons, including a lack of resources to evaluate the project. In addition, a certifying authority may be deemed to have waived certification for various reasons,

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[60] *See* section 401(a)(2) ("Upon receipt of such *application and certification* the licensing or permitting agency shall immediately notify the Administrator of such *application and certification*.") (emphasis added).

including if that certifying authority fails or refuses to act on a request for certification before the end of the reasonable period of time. *See* section V.F in this preamble for further discussion on waivers. Ultimately a waiver of certification allows the Federal licensing or permitting agency to issue its license or permit without receipt of a water quality certification. As a result, a waived certification could result in water quality impacts that might violate a neighboring jurisdiction's water quality requirements. It seems reasonable to afford a mechanism for EPA and a neighboring jurisdiction to evaluate that possibility. Second, this approach is consistent with the Agency's approach to section 401(a)(2) for over 50 years. *See* 40 CFR 121.16 (2019). Therefore, consistent with the approach taken in the 1971 Rule, the Agency is proposing to restore the interpretation that waivers, in addition to certifications, initiate the section 401(a)(2) process.

Additionally, the Agency is proposing to clarify the term "application" as applied to section 401(a)(2). Section 401(a)(2) requires a Federal licensing or permitting agency to notify EPA upon receipt of application and certification. 33 U.S.C. 1341(a)(2). Section 401 uses the term "application" throughout section 401(a); however, when read in context, the term is used for both "applications for certification" and "applications for such Federal license or permit." The Agency considers the "request for certification" to be an "application for certification." *See* section V.C in this preamble for further discussion on a request for certification. In the context of section 401(a)(2), the term "application" is used to refer to the "application for such Federal license or permit." *Id*. As a result, section 401(a)(2) is initiated upon the Federal licensing or permitting agency's receipt of such Federal license or permit application *and* either a section 401 certification or a waiver of certification. However, the Agency is aware that there are instances where a Federal license or permit application does not accompany a certification or waiver (*e.g.*, certification on general permits or Corps civil works projects). To account for Federal agencies' different licensing or permitting practices, the Agency is proposing to clarify that the term "application" in this regulation means the license or permit application to a Federal agency, or if

available, a draft license or permit.[61] *See* proposed § 121.1(c).

As noted, the Agency is further seeking to clarify when a Federal agency must provide notification to EPA under section 401(a)(2) and is proposing basic procedures for Federal agencies to follow when providing such notification. As discussed above, section 401(a)(2) provides that the Federal licensing or permitting agency must "immediately" notify the EPA Administrator upon receipt of an application for a Federal license or permit and certification. *See* 33 U.S.C. 1341(a)(2). EPA seeks to clarify that a Federal agency is only considered to be in receipt of an application for a license or permit and certification within the meaning of section 401(a)(2) when such agency has received *both* an application for a license or a permit, as discussed above, *and* has either received a corresponding certification or a waiver has occurred.[62] It is typical for Federal agencies to receive applications for licenses or permits in advance of receipt of certification or waiver. In such circumstances, it would be premature for the Federal agency to provide EPA with notification under section 401(a)(2) until it has also received the certification or waiver has occurred and the statute accordingly only requires notification to EPA when the certifying agency is in possession of both.[63]

Furthermore, to aid in clarity and implementation, the Agency is proposing to retain the 2020 Rule interpretation of "immediately" to mean within five days of the Federal agency's receipt of the application for a Federal license or permit and either receipt of certification or waiver. Under the 2020 Rule, the Agency also interprets the term "immediately" to mean within

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[61] For this proposed rulemaking, EPA is not suggesting that Corps civil works projects are exempt from section 401(a)(2) processes, even though there are no "applications" or draft licenses or permits. Rather, EPA expects the Corps to determine how best to comply with all section 401 requirements. Compliance may involve the Corps sending a project study in conjunction with a certification or a waiver of certification.

[62] Although this statutory language is unambiguous, EPA is further discussing when receipt occurs due to questions and conflicting practices among Federal licensing and permitting agencies.

[63] It is necessary that certification or waiver occur for EPA to make a determination as to whether a discharge from the activity "may affect" the water quality of a neighboring jurisdiction under section 401(a)(2), as EPA only makes such a determination where certification or waiver has occurred, and considers any conditions included in a certification in making this determination.

five days of the Federal agency receiving notice of application and certification to encourage clear, consistent timing of the notification to EPA. 40 CFR 121.12(a); *see* 85 FR 42273. The Agency is not aware of any practical challenges or issues posed by this timeframe. The Federal agency needs some amount of time to process receipt of the permit or license application and certification or waiver from the project proponent or certifying authority, review the received materials, which might be substantial, and then transmit notice to the appropriate EPA regional office. EPA considers five days a prompt yet reasonable amount of time to complete this process. EPA is soliciting comment on whether it should interpret "immediately" in this context to mean a different period of time than five days, and whether five days provides Federal agencies with sufficient time to provide notice to EPA or if additional time is required.

Although the text of section 401(a)(2) requires a Federal agency to notify EPA upon receipt of an application and certification, it does not define the contents of such notification. 33 U.S.C. 1341(a)(2). The 1971 Rule and 2020 Rule provided some direction on information that could be submitted to EPA as part of the section 401(a)(2) process, but neither regulation defined the contents of the section 401(a)(2) notification. *See* 40 CFR 121.12(b); 40 CFR 121.13 (2019).

The 1971 Rule provided that upon receipt of application for a license or permit with an accompanying certification, the Federal agency shall forward copies of the application and certification to the Regional Administrator. 40 CFR 121.11 (2019). It further stated that only those portions of the application which relate to water quality shall be forwarded to the Regional Administrator and allows for the Regional Administrator to ask for supplemental information if the documents forwarded do not contain sufficient information to make the determination provided for in § 121.13. *See* 40 CFR 121.12 and 121.13 (2019). In the preamble to the 2020 Rule, EPA said it expects Federal agencies to develop notification processes and procedures but noted that the Administrator could request copies of the certification and application. 85 FR 42273. During implementation of the 2020 Rule, some but not all agencies have developed their own procedures, and these procedures have varied between agencies and across the country.

To provide consistency and to streamline the notification process, EPA is proposing to add regulatory text defining the minimum level of information that must be included in the notification to EPA. The Agency is proposing that the notification be in writing and contain a general description of the proposed project, including but not limited to: permit or license identifier, project location information (e.g., latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing comment on the project. If the Federal agency is aware that a neighboring jurisdiction provided comment on the project, the notification shall include a copy of those comments. Additionally, the notification shall include a copy of the certification or notice of waiver, and the application, as defined at proposed § 121.1(c). If supplemental information is needed to make a determination pursuant to section 401(a)(2), the Regional Administrator may ask for it in writing with a timeframe for a response, and the Federal agency shall obtain that information from the project proponent and forward the additional information to the Regional Administrator within the specified timeframe. If supplemental information is not provided in a timely manner, EPA may consider that lack of information as a factor in its "may affect" determination. The Agency may also develop agreements with Federal agencies to refine the notification process and the provision of supplemental information. The Agency is soliciting comment on the proposed aspects of the notification process, including the timing and the contents of the Federal agency notification to EPA.

2. EPA's role under section 401(a)(2)

Section 401(a)(2) states that whenever a discharge "may affect, as determined by the Administrator, the quality of the waters of any other State," the Administrator must notify the other neighboring jurisdiction, Federal agency, and the project proponent of their determination within thirty days of the date of notice of the application. 33 U.S.C. 1341(a)(2). Under the 1971 Rule, the Regional Administrator was required to review the Federal license or permit

application, the certification, and any supplemental information provided to EPA, and, if the Regional Administrator determined that there was "reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates," the Regional Administrator would notify the affected jurisdictions within thirty days of receipt of the application materials and certification. *See* 40 CFR 121.13 (2019).

Similarly, the 2020 Rule acknowledges EPA's responsibility to notify a neighboring jurisdiction whenever it determined that a discharge from the certified activity may affect the water quality of the neighboring jurisdiction. 40 CFR 121.12(b), 85 FR 42274. However, the 2020 Rule asserted that it was within the Agency's discretion whether to make a "may affect" determination in the first place, and that EPA was, therefore, not required to make such a determination. 85 FR 42273. Additionally, the 2020 Rule does not clearly state in either regulatory text or the preamble whether there are specific factors that the Administrator must consider in making a "may affect" determination and whether any other interested party can be involved when EPA is making a "may affect" determination. *Id*. During the pre-proposal outreach, stakeholders raised concerns that EPA had not clearly identified what factors it intended to use in determining whether a discharge "may affect" the water quality of a neighboring jurisdiction. Stakeholders also objected to EPA asserting sole discretion over this "may affect" determination without obtaining input from the neighboring jurisdiction or other stakeholders.

To date, only one Federal district court has addressed EPA's obligation to make a determination pursuant to section 401(a)(2). In *Fond du Lac*, the court addressed two issues concerning section 401(a)(2): (1) whether EPA is required to make a "may affect" determination and (2) whether EPA's "may affect" determination is judicially reviewable. 519 F.Supp.3d 549.The court concluded that EPA is required to determine whether the discharge may affect the quality of a neighboring jurisdiction's waters. In coming to this conclusion, the court examined the statutory text and found that it requires EPA to make "a discrete factual determination . . .

within a specific timeframe . . . based on an application and certification. . . ." *Id.* at 564. The court further concluded that Federal courts have the jurisdiction to review EPA's "may affect" determination. The court did not opine on the specific meaning of "may affect" means or factors that EPA should consider in making a "may affect" determination.

EPA agrees with the *Fond du Lac* court that EPA must determine whether a discharge "may affect" a neighboring jurisdiction once it receives notification of the application and certification or waiver, and EPA is proposing to revise the regulation accordingly. When EPA is the Federal licensing or permitting agency (*e.g.*, EPA-issued NPDES permits), EPA intends to include such "may affect" determination in the administrative record for the permit action. EPA is further proposing that, in making a "may affect" determination, EPA has the discretion to look at a variety of factors depending on the type of license or permit and discharge. Factors that EPA could consider in making a "may affect" determination include, but are not limited to, the type of project and discharge covered in the license or permit, the proximity of the project and discharge to other jurisdictions, certification and other conditions already contained in the draft license/permit, and the neighboring jurisdiction's water quality requirements. Given the range of Federal licenses or permits that are covered by CWA section 401(a)(2) and EPA's discretion to look at various factors, EPA is not proposing to identify specific factors EPA must analyze in making a "may affect" determination. Indeed, as each "may affect" determination is likely to be fact-dependent and based on situation-specific circumstances, EPA is uncertain that providing a required list of factors is possible. However, in the interest of transparency, EPA is asking for comment on whether such a list of specific factors that EPA must consider in making a "may affect" determination should be set forth in regulation and, if so, what factors should be included.

EPA is further clarifying that, once it receives notice from a Federal agency initiating its obligation to make a "may affect" determination, it is within EPA's sole discretion to examine the facts and determine whether the discharge "may affect" the quality of a neighboring jurisdiction's waters. Section 401(a)(2) provides that "[w]henever such a discharge may affect,

as determined by the Administrator. . . ." 33 U.S.C. 1341(a)(2) (emphasis added). EPA interprets this language as providing the Agency with sole discretion in making a "may affect" determination. Accordingly, EPA is not required to engage with stakeholders or seek their input in making this determination. If an interested party does not agree with EPA's determination, that interested party may have recourse under the Administrative Procedure Act as discussed in *Fond du Lac*. However, in making its "may affect" determination, the Agency does intend to consider the views of other jurisdictions if provided in a timely manner. As discussed above, the Agency is proposing to define the contents of a Federal agency's notification to EPA to include an indication of whether any neighboring jurisdictions have expressed water quality concerns or provided such comment on the project.[64] Other factors informing the Agency's "may affect" determination evaluation are discussed above, including the nature of the neighboring jurisdiction's water quality requirements.

After receiving notification from the Federal licensing or permitting agency, EPA has 30 days to complete its "may affect" determination evaluation. 33 U.S.C. 1341(a)(2). If EPA determines that the discharge may affect a neighboring jurisdiction's water quality, EPA must notify the neighboring jurisdiction, the Federal licensing or permitting agency, and the project proponent. *Id*. EPA is proposing to retain regulatory text similar to 40 CFR 121.12(c) that clarifies which stakeholders EPA must notify upon making a "may affect" determination. The Agency is also proposing to define the contents of such notification similar to the 2020 Rule. The 1971 Rule did not define the contents of a "may affect" notification from EPA to a neighboring jurisdiction, Federal agency, and project proponent. However, the 1971 Rule provided that EPA must send the neighboring jurisdiction a copy of the application and certification it received to initiate the section 401(a)(2) process. 40 CFR 121.14 (2019). The 2020 Rule defines the contents of EPA's notification. 40 CFR 121.12(c)(1). EPA is proposing to revise the provision from the

[64] There are other opportunities for stakeholders to provide input into the certification and licensing or permitting process, including the public notice and comment processes on the certification and the license or permit.

2020 Rule and clarify that its notification shall be in writing and shall include a statement that the Agency has determined that the discharge may affect the neighboring jurisdiction's water quality, as well as a description of the next steps in the section 401(a)(2) process, a copy of the certification or waiver, and a copy of the license or permit application. *See* proposed § 121.13. The proposed regulation also retains similar text as the 2020 Rule that, once EPA makes a "may affect" determination, a Federal license or permit may not be issued pending the conclusion of the section 401(a)(2) process, as described in further detail below. Accordingly, the Agency is proposing to remove the regulatory provision located at § 121.9(e) which provides that a Federal agency may issue a license or permit upon issuance of a written notice of waiver. As discussed above, waivers also trigger the section 401(a)(2) process and EPA may make a "may affect" determination based upon a waiver of certification. Consistent with the proposed language at § 121.13(d), a Federal agency may not issue a Federal license or permit until the section 401(a)(2) process concludes.

Upon completion of its "may affect" determination evaluation, if EPA does not find that a discharge from the activity may affect the water quality of a neighboring jurisdiction, then EPA is not required to provide notification of its determination. *See* 33 U.S.C. 1341(a)(2). If a Federal licensing or permitting agency does not receive notification from EPA that the discharge may affect a neighboring jurisdiction's water quality within 30 days after proper notification, then the Federal agency may proceed with processing the license or permit.

3. Neighboring jurisdiction's role under section 401(a)(2)

CWA section 401(a)(2) states that if, within sixty days after receipt of EPA's notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such 60 day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. 33 U.S.C. 1341(a)(2). The 1971 Rule did not

describe the contents or form that such an objection notification must take. However, the 2020 Rule clarifies that the objection notification must identify the receiving waters that are determined to be affected and identify the specific water quality requirements that will be violated. 40 CFR 121.12(c)(2); 85 FR 42274.

In this rule, EPA is proposing to revise the specific requirements for what a neighboring jurisdiction is required to include in an objection notification sent pursuant to section 401(a)(2). Initially, as required by the statute, the neighboring jurisdiction must act within 60 days of receipt of EPA's notification, and must provide its objection and request for public hearing in writing to EPA and the licensing and permitting authority. EPA is also proposing that the objection notification be sent to the certifying authority. Further, EPA is proposing that the neighboring jurisdiction include an explanation of the reasons supporting its determination that the discharge will violate its water quality requirements, including but not limited to identifying any water quality requirements that will be violated. This will allow EPA and the Federal licensing or permitting agency to understand the basis for the objection. EPA is not proposing to retain the regulatory text requiring the neighboring jurisdiction to identify the receiving waters that will be affected by the discharge. However, EPA anticipates this information will likely be included in the neighboring jurisdiction's explanation of the reasons supporting its determination that the discharge will violate its water quality requirements. EPA is not proposing to require the neighboring jurisdiction to identify a license or permit condition that it thinks would resolve the objection; however, EPA encourages neighboring jurisdictions to offer such a condition or conditions and is requesting comment on whether this element should be required by regulation.

4. Objection and public hearing process under section 401(a)(2)

As discussed above, a neighboring jurisdiction must request a public hearing from the Federal licensing or permitting agency as part of its objection. CWA section 401(a)(2) does not provide for a specific process for the section 401(a)(2) public hearing. It merely states that, if a neighboring jurisdiction objects to a Federal license or permit and requests a public hearing

within the 60-day timeframe, the Federal licensing or permitting agency must hold a hearing. 33 U.S.C. 1341(a)(2). The statute further provides that the EPA Administrator must submit an evaluation and recommendations regarding the objection at the hearing. *Id*. In addition, section 401(a)(2) states that additional evidence may be presented at the hearing. After the public hearing, the Federal licensing or permitting agency must consider the recommendations of the neighboring jurisdiction and EPA Administrator as well as any additional evidence presented at the hearing and, based on that information, must condition the license or permit as may be necessary to ensure compliance with applicable water quality requirements. If additional conditions cannot ensure compliance with applicable water quality requirements, the license or permit cannot be issued. *Id*. Notably, the statute is silent as to whether public notice of the public hearing is required; the nature of, and specific procedures for, the public hearing; the need for a court reporter or transcript; whether the Federal licensing or permitting agency's decision is appealable; and other such matters.

The 1971 Rule provided that, in cases where the Federal licensing or permitting agency held a public hearing on the objection raised by a neighboring jurisdiction, the licensing or permitting agency was required to forward notice of such objection to the Regional Administrator no later than 30 days prior to the hearing. 40 CFR 121.15 (2019). At the hearing, the Regional Administrator was required to submit an evaluation and "recommendations as to whether and under what conditions the license or permit should be issued." *Id*. EPA retained these requirements in the 2020 Rule. 40 CFR 121.12(c)(3); 85 FR 42274.

The Agency is proposing to add transparency to the section 401(a)(2) process by requiring the Federal agency to provide for a minimum of a 30-day public notice of the hearing. This will allow for notice to all interested parties, including the neighboring jurisdiction and EPA, and provide adequate time for such parties to determine whether they have any interest in attending the public hearing. EPA is not defining the type of public hearing that the Federal agency must hold since many Federal agencies have their own regulations regarding public

hearings on permits and licenses; however, EPA recommends that the public hearing would be one at which the Federal agency accepts comments and additional evidence on the objection. EPA defers to the Federal agency to decide whether the public hearing would be conducted in-person and/or remotely through telephone, online, or other virtual platforms depending on the circumstances and the Federal agency's public hearing regulations.

As discussed, section 401(a)(2) provides that the EPA Administrator shall submit an evaluation and recommendations on the objection raised by the neighboring jurisdiction at the hearing conducted by the Federal licensing or permitting agency. The statutory text does not elaborate on how the Administrator is to develop its evaluation and recommendations or what specific elements it must include. Accordingly, the statute provides EPA with considerable discretion in developing its evaluation and recommendations.

EPA interprets its role in providing the evaluation and recommendations on the neighboring jurisdiction's objection as that of an objective and neutral evaluator providing recommendations to the licensing or permitting Federal agency based upon its expert, technical analysis of the record before it. EPA intends to conduct its evaluation and make any recommendations based on the information before it, giving equal consideration to the information and views—if provided—by interested parties, including the objecting neighboring jurisdiction, project proponent, and certifying authority. Consistent with this approach, as a general matter EPA does not intend to invite comment and input from, or engage with, interested parties when developing its evaluation and recommendations on the objection. However, EPA may, where it deems it appropriate, seek additional information from a neighboring jurisdiction regarding its objection to be sure EPA is able to develop an informed and well-supported evaluation and accompanying recommendations. This approach to developing its evaluation and recommendations is consistent with the hearing process established by section 401(a)(2), which recognizes a role for the neighboring jurisdiction independent of the Agency and allows for presentation of evidence at the hearing by any interested stakeholder, including the neighboring

jurisdiction. If a stakeholder agrees or disagrees with EPA's evaluation and recommendations presented at the hearing, such stakeholder may have an opportunity to provide additional information and comment directly to the Federal agency for its consideration.

After conducting the public hearing, pursuant to CWA section 401(a)(2), the Federal licensing or permitting agency must consider the recommendations of the neighboring jurisdiction and EPA, as well as any additional evidence presented at the hearing, as it determines whether additional permit or license conditions are necessary to ensure compliance with applicable water quality requirements. 33 U.S.C. 1341(a)(2). The Act does not accord special status to EPA's evaluation and recommendations compared with the neighboring jurisdiction's input or other evidence received at the hearing; rather, the section appears to contemplate that the Federal agency will consider all of the information presented in making its decision. If the Federal licensing or permitting agency determines that additional conditions may be necessary to ensure compliance with the neighboring jurisdiction's water quality requirements, the Federal licensing or permitting agency must include those conditions in the Federal license or permit. In addition, if the Federal licensing or permitting agency cannot include conditions that will ensure compliance with applicable water quality requirements, the Federal agency cannot issue the license or permit. EPA is proposing to specifically incorporate these statutory requirements in regulatory language.

EPA is not, however, proposing to establish a deadline by which the Federal licensing or permitting agency must make a determination after the public hearing. EPA is requesting comment on whether such a deadline should be established.

CWA section 401(a)(2) states that if the neighboring jurisdiction notifies EPA and the licensing or permitting agency "in writing of its objection to the issuance of [the] license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing." 33 U.S.C. 1341(a)(2). For a hearing to be required under section 401(a)(2), there must be (1) a written objection from the neighboring jurisdiction and (2) a request for a

public hearing on the objection. *Id*. EPA is proposing that if one of these elements is not present, the Federal agency is not required to hold a hearing. If a neighboring jurisdiction can resolve its concerns with the Federal licensing or permitting agency before a public hearing is held, then under this proposed approach, the neighboring jurisdiction could withdraw its objection and, as a result, a public hearing would not be required. EPA does not assume that a withdrawal of a written objection would eliminate the need for the Federal licensing or permitting agency to comply with its own public notice requirements if resolution of the objection results in a change to the permit or license. EPA is requesting comment on whether a neighboring jurisdiction could withdraw its objection before the hearing is held and, thus, eliminate the requirement to hold a public hearing. EPA is also requesting comment on whether it should develop any regulatory text to clarify this aspect of the section 401(a)(2) process.

L. Treatment in a Similar Manner as a State Under Section 401

This proposed rulemaking would add provisions enabling tribes to obtain treatment in a similar manner as a state (TAS) solely for section 401, as well as provisions on how tribes can obtain TAS for the limited purpose of participating as a neighboring jurisdiction under section 401(a)(2). These proposed provisions provide more opportunities and clarity for tribes interested in participating in the section 401 certification process. Although the CWA clearly allows tribes to obtain TAS for section 401, current regulations and practice treat TAS for section 401 as an adjunct to TAS for the CWA section 303(c) program for water quality standards.

Section 401 specifies that certification under section 401(a)(1) shall be made by the state in which the discharge originates or will originate, or if appropriate, the interstate water pollution control agency with jurisdiction over the waters of the United States where the discharge originates or will originate. 33 U.S.C. 1341(a)(1). Likewise, under section 401(a)(2) the Administrator considers whether a discharge from a project may affect "the quality of the waters of any other state" in initiating the neighboring jurisdiction process. *Id*. at 1341(a)(2). Prior Agency guidance and the 2020 Rule preamble provided that only tribes with TAS for section 401

may act as certifying authorities under section 401(a)(1) and may act as neighboring jurisdictions under section 401(a)(2). 85 FR 42270, 42274; 2010 Handbook, at 6 (rescinded). The 1971 Rule did not address tribes with TAS; the TAS provisions in the CWA were not introduced until the 1987 CWA Amendments.

Under section 518 of the CWA, EPA may treat federally-recognized Indian tribes in a similar manner as a state for purposes of administering most CWA programs over Federal Indian reservations. 33 U.S.C. 1377. Under section 518 and EPA's implementing regulations, an Indian tribe is eligible for TAS to administer CWA regulatory programs, including section 401, if it can demonstrate that (1) it is federally-recognized and exercises governmental authority over a Federal Indian reservation;[65] (2) it has a governing body carrying out substantial governmental duties and power; (3) it has the appropriate authority to perform the functions to administer the program; and (4) it is reasonably expected to be capable of carrying out the functions of the program it applied to administer. *See* 33 U.S.C. 1377(e), (h); *see also, e.g.*, 40 CFR 131.8.

While certain CWA programs have TAS implementing regulations,[66] there are currently no such regulations tailored solely for section 401. In the absence of TAS provisions tailored specifically for section 401, tribes have received TAS for section 401 when eligible for TAS to administer the section 303(c) program for water quality standards. 40 CFR 131.4(c) ("Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401."). To date, 78 federally-recognized tribes (out of 574) have received TAS for section 401 concurrently with obtaining TAS for section 303(c).[67]

Upon receiving TAS for section 401, tribes have two roles. First, tribes that receive

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[65] "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. 33 U.S.C. 1377(h)(1).

[66] For example, there are TAS regulatory provisions for the CWA section 303(c) water quality standards (WQS) program, located at 40 CFR 131.8, and for the CWA section 303(d) impaired water listing and total maximum daily load program, located at 40 CFR 130.16.

[67] *See* https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

section 401 TAS are responsible for acting as a certifying authority for projects that may result in a discharge into waters of the United States on their Indian reservations. As certifying authorities, tribes with TAS may grant, grant with conditions, deny, or waive certification based on whether a federally licensed or permitted project will comply with sections 301, 302, 303, 306, and 307 of the CWA and any other appropriate requirements of tribal law. *See* 33 U.S.C. 1341(a)(1) and (d). Second, tribes that receive section 401 TAS are accorded the status of "neighboring jurisdiction" for purposes of section 401(a)(2). If EPA makes a "may affect" determination with respect to that neighboring jurisdiction, the neighboring jurisdiction, including tribes with TAS for section 401, may object to the Federal license or permit if they determine that the discharge "will violate" their water quality requirements and request a public hearing from the Federal licensing or permitting agency. 33 U.S.C. 1341(a)(2).

EPA is proposing a section 401-specific set of requirements and procedures for tribes seeking TAS for purposes of making sections 401(a)(1) and 401(d) certification decisions and for exercising their statutory rights as a "neighboring jurisdiction" under section 401(a)(2). These proposed procedures do not eliminate or modify the section 401 procedures already found in part 131. Instead, they provide an alternate path for tribes wishing to obtain TAS status only for section 401 and not also for section 303(c).

1. Obtaining TAS for section 401

Proposed § 121.11 includes the criteria an applicant tribe would be required to meet to be treated in a similar manner as states, the information the tribe would be required to provide in its application to EPA, and the procedure EPA would use to review the tribal application. This section is intended to ensure that tribes treated in a similar manner as states for the purposes of the section 401 water quality certification program are qualified, consistent with CWA requirements, to implement a water quality certification program. The procedures are meant to provide more opportunities for tribes to engage fully in the program and are not intended to act as a barrier to tribal assumption of the section 401 program. The proposed procedures are

modeled after the TAS regulatory provisions for the CWA section 303(c) WQS program, located at 40 CFR 131.8, and the TAS provisions for the CWA section 303(d) impaired water listing and total maximum daily load program, located at 40 CFR 130.16. The WQS TAS regulations, developed in the early 1990s, have acted as a model for other programs including the section 303(d) regulations. *See* 81 FR 65905. Additionally, as discussed above, EPA's TAS regulations allow tribes to simultaneously obtain TAS for sections 303(c) and 401 and have been used by 78 tribes to date. As a result, the Agency thinks the part 131 and part 130 TAS regulations provide an appropriate model for this proposal.

Consistent with the requirements provided in CWA section 518, EPA proposes that four criteria must be met for tribes to obtain TAS for section 401. First, the tribe should be federally recognized by the U.S. Department of the Interior and meet the definitions in proposed § 121.1(f) and (g). Second, the tribe should have a governing body that carries out "substantial governmental duties and powers" over a defined area. Third, the tribe should have appropriate authority to regulate and manage water resources within the borders of the tribe's reservation. Lastly, the tribe should be reasonably expected, in the Regional Administrator's judgment, to be capable of administering a section 401 water quality certification program.

The tribe may satisfy the first criterion by stating that it is included on the list of federally recognized tribes that is published periodically by the U.S. Department of the Interior. Alternatively, the tribe may submit other appropriate documentation (*e.g.*, if the tribe is not yet included on the U.S. Department of the Interior list but is federally recognized).

To meet the second criterion, the tribe would show that it conducts "substantial governmental duties and powers," which the Agency views as performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographical area. *See* 54 FR 39101; 81 FR 65906. This requires a descriptive statement that should 1) describe the form of tribal government, 2) describe the types of essential governmental functions currently performed by the tribal governing body, including but not limited to, the

exercise of the power of eminent domain, taxation, and police power, and 3) identify the sources of authorities to carry out these functions.

To establish the third criterion that the tribe has the authority to manage the water resources within the borders of the tribe's reservation, the tribe would submit a descriptive statement comprised of two components. First, the statement should include a map or legal description of the area over which the tribe has authority to regulate surface water quality. Second, there should be a statement signed by the tribe's legal counsel or equivalent explaining the legal basis for the tribe's regulatory authority. EPA notes that section 518 of the CWA includes a delegation of authority from Congress to eligible Indian tribes to regulate the quality of waters of their reservations under the CWA. *See* 81 FR 30183 (May 16, 2016). Absent rare circumstances that may affect a tribe's ability to effectuate the delegation of authority, tribes may rely on the congressional delegation of authority included in section 518 of the statute as the source of authority to administer a section 401 water quality certification program. This is identical to the manner in which tribes have been demonstrating authority for eligibility to administer 401 certifications under existing TAS regulations, the only change being that under the new proposed regulations, tribes would be able to seek TAS eligibility for section 401 only. Similarly, as with tribes already administering section 401 under prior TAS approvals, the authority to issue certifications exercised by a tribe authorized under the new proposed regulation will, by virtue of the congressional delegation, apply throughout the reservation area covered by the TAS approval, irrespective of land ownership or the tribal membership status of the Federal license applicant. *See, e.g.*, 81 FR 30190. Therefore, grants or waivers of certification by an authorized tribe, as well as any conditions included in a certification or denials of certification by an authorized tribe, would apply to any application for a Federal license throughout the relevant reservation without any separate need to demonstrate inherent tribal jurisdiction.

A tribe may satisfy the fourth criterion regarding its capability by either (1) providing a

description of the tribe's technical and management skills to administer a water quality certification program or (2) providing a plan that proposes how the tribe will acquire such skills. Additionally, when considering tribal capability, EPA would also consider whether the tribe can demonstrate the existence of institutions that exercise executive, legislative, and judicial functions, and whether the tribe has a history of successful managerial performance of public health or environmental programs.

To provide direction on how a tribe may meet the criteria described above, EPA is also proposing to describe the contents of an application for TAS for section 401. *See* proposed 40 CFR 121.11(b). These contents include a statement that the tribe is recognized by the Secretary of the Interior, a descriptive statement that demonstrates the tribal government carries out substantial duties and powers, a descriptive statement of the tribe's authority to regulate water quality, and a narrative statement that describes the tribe's capability to administer a section 401 water quality certification program. Consistent with existing TAS regulations for other programs, the proposed rulemaking also provides that tribal applicants include additional documentation that may be required by EPA to support the tribal application. Each TAS application will present its own set of legal and factual circumstances, and EPA anticipates that in some cases it may be necessary to request additional information when reviewing a tribe's application. Such requests would, for instance, generally relate to ensuring that the application contains sufficient complete information to address the required statutory and regulatory TAS criteria. This could include, for instance, information relating to a unique issue pertaining to the applicant tribe or its reservation or an issue identified during the comment process described below. Consistent with longstanding practice, the Agency would work with tribes in an appropriately streamlined manner to ensure that their TAS applications contain all necessary information to address applicable statutory and regulatory criteria. If a tribe has previously qualified for TAS under another EPA program, the tribe is only required to submit information that was not previously submitted as part of a prior TAS application.

EPA is also proposing to describe EPA's procedures to review and process an application for section 401 TAS. *See* proposed 40 CFR 121.11(c). Under this proposal, once EPA receives a complete tribal application, it will promptly notify the tribe of receipt and process the application in a timely manner. Within 30 days after receipt of the tribe's complete application for section 401 TAS, EPA shall provide notice to appropriate governmental entities[68] of the application, including information on the substance of and basis for the tribe's assertion of authority to regulate reservation water quality. Appropriate governmental entities will be given 30 days to provide comment on the tribe's assertion of authority. Consistent with prior practice regarding such notice in connection with TAS applications for other programs, EPA also intends to provide sufficiently broad notice (*e.g.,* through local newspapers, electronic media, or other appropriate media) to inform other potentially interested entities of the applicant tribe's complete application and of the opportunity to provide relevant information regarding the tribe's assertion of authority. If the tribe's assertion of authority is challenged, EPA will determine whether the tribe has adequately demonstrated authority to regulate water quality on the reservation after considering all relevant comments received.

However, if a tribe previously qualified for TAS for another program that also required a tribe to demonstrate authority to regulate reservation water quality (*i.e*., CWA section 303(c) program, CWA section 303(d) program, CWA section 402 program, or CWA section 404 program) and EPA provided a notice and comment opportunity, the Agency would not require notice on the tribe's assertion of authority to appropriate governmental entities in the section 401 TAS application unless there were different jurisdictional issues or significant new factual or legal information relevant to jurisdiction. EPA thinks this approach could help streamline the process and avoid a potentially duplicative notice process. The Agency is proposing to apply this

[68] EPA defines the term "appropriate governmental entities" as "States, tribes, and other Federal entities located contiguous to the reservation of the tribe which is applying for treatment as a State." 56 FR 64876, 64884 (December 12, 1991).

approach prospectively only, *i.e.,* where the tribe obtains TAS for the CWA section 303(c), 402, or 404 programs after the effective date of this rule. In other words, if a tribe first gains TAS for another CWA regulatory program after this rule is finalized, and subsequently seeks TAS under this rule, additional notice and comment would not be required as part of the section 401 TAS application unless different jurisdictional issues or significant new factual or legal information relevant to jurisdiction are presented in the 401 application. If the Regional Administrator determines that a tribe's application meets the requirements proposed in § 121.11(b), the Regional Administrator would promptly notify the tribe in writing. A decision by the Regional Administrator that a tribe does not meet the requirements proposed in § 121.11(b) would not preclude the tribe from resubmitting the application at a future date. If the Regional Administrator determines that a tribal application is deficient or incomplete, EPA will identify such deficiencies and gaps so the tribe can make changes as appropriate and necessary.

Promulgating a regulation expressly providing a process and requirements for section 401 TAS in the absence of 303(c) TAS is consistent with section 518 and would provide clarity and increased opportunities for interested tribes to participate in section 401. Additionally, developing regulations on section 401 TAS as a standalone process for tribes seeking this authority who are not concurrently applying for section 303(c) TAS may encourage more tribes to seek TAS for section 401. Decoupling section 401 TAS from section 303(c) recognizes that section 401 and section 303 administration are related, but distinct functions and is responsive to tribal stakeholders who have expressed an interest in participating in the section 401 certification process. EPA is requesting comment on this more targeted proposed approach to obtaining TAS for section 401.

2. Obtaining TAS for section 401(a)(2)

If a tribe receives TAS for section 401, it is treated in a manner similar to a state and considered an "authorized tribe" for purposes of exercising its statutory authority under section 401. Generally, the Federal statutory and the proposed regulatory requirements for state water

quality certification would apply to authorized tribes, including acting as a certifying authority and neighboring jurisdiction, as appropriate. However, EPA is also proposing regulatory language that would allow a tribe to apply for TAS for only the limited purpose of being a neighboring jurisdiction under section 401(a)(2). As noted above, prior Agency guidance and the 2020 Rule preamble expressed the interpretation that only tribes with TAS status may participate as a neighboring jurisdiction under section 401.[69] This is because, unlike section 401(a)(1), which specifically requires EPA to act as a certifying authority on behalf of jurisdictions without the authority to certify,[70] section 401(a)(2) only provides "states" with an opportunity to participate as a neighboring jurisdiction.

Although 78 tribes have received TAS for section 401 to date, EPA recognizes that some tribes may not desire or have the resources to apply for the section 401 certification program. However, pre-proposal input suggests that tribes may wish to be notified about, and have the ability to object to and provide information regarding, potential Federal licenses and permits that may impact their waters. Several tribal stakeholders have expressed concern that tribes without TAS are not able to participate in the section 401(a)(2) neighboring jurisdiction process. In light of this input, EPA is proposing to provide tribes with an opportunity to seek TAS authorization for the limited purpose of being a neighboring jurisdiction pursuant to section 401(a)(2).

This approach has been taken in other EPA programs. For example, the Agency's regulations under the Clean Air Act provide opportunities for interested tribes to seek TAS authorization for reasonably severable elements of programs under that statute, so long as such elements are not integrally related to program elements that are not included and are consistent with applicable statutory and regulatory requirements. *See* 40 CFR 49.7(c). Under that authority, EPA has approved tribes for TAS authorization for the procedural comment opportunity provided in connection with issuance of certain permits by upwind permitting authorities,

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[69] *See* 2010 Handbook (rescinded); 85 FR 42274.

[70] 33. U.S.C. 1341(a)(1) ("In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator.")

without requiring those tribes to seek authorization for the entire relevant program. *See* 42 USC 7661d(a)(2).

EPA thinks that the neighboring jurisdiction role under section 401(a)(2) is similar. See discussion in section V.K in this preamble.[71] EPA thinks it is appropriate to allow tribes wishing to protect their water quality interests under section 401(a)(2) to apply for and obtain TAS status to do so independently of whether they also desire to take on the separate responsibility to act pursuant to sections 401(a)(1) and 401(d). Nothing in the language of section 401 precludes this approach.

Additionally, EPA thinks that the neighboring jurisdiction role under section 401(a)(2) is reasonably severable from the statute's other water quality certification activities. Section 401 provides separate and distinct roles for certifying authorities and neighboring jurisdictions. As noted above, the statutory language expressly provides a role for states and EPA to act as certifying authorities in section 401(a)(1), but only provides a role for states to act as a neighboring jurisdiction in section 401(a)(2). While both sections allow states and tribes with TAS status to inform the Federal licensing or permitting process, there are significant differences. For example, if a certifying authority places conditions on a Federal license or permit through a water quality certification, the Federal agency must incorporate those conditions into the license or permit. 33 U.S.C. 1341(d). However, if a neighboring jurisdiction objects to a Federal license or permit and recommends conditions it would like to see in the Federal license or permit, the Federal agency must consider that objection and recommended

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[71] Under section 401(a)(2), once EPA determines that a federally licensed or permitted discharge may affect the water quality of a neighboring jurisdiction, EPA must notify that neighboring jurisdiction. 33 U.S.C. 1341(a)(2). In turn, the neighboring jurisdiction has 60 days to evaluate the notice and determine whether the discharge will violate its water quality requirements, object to the issuance of the license or permit, and request a public hearing from the Federal licensing or permitting agency. *Id*. Ultimately, the Federal licensing or permitting agency is responsible for evaluating the neighboring jurisdiction's input, in addition to EPA's input and other input received at the public hearing, to determine whether it needs to condition the license or permit to assure that it will comply with the neighboring jurisdiction's water quality requirements. If conditions cannot assure such compliance, then the Federal agency may not issue the license or permit. *Id*.

conditions as part of its broader analysis, but it is not required to incorporate them verbatim as required by section 401(d). Rather, the Federal agency is only required to impose a neighboring jurisdiction's recommended conditions to the extent they are necessary to assure compliance with the neighboring jurisdiction's applicable water quality requirements. *Id*. at 1341(a)(2).

EPA thinks that authorizing tribes to obtain TAS solely for section 401(a)(2) would allow tribes not interested in issuing their own certifications to have an opportunity to participate as a neighboring jurisdiction where discharges into another jurisdiction's waters may affect their own water quality. The proposed approach is responsive to stakeholder feedback and promotes tribal agency by providing an opportunity for tribes to protect their water quality by participating in the section 401 certification process without requiring the tribe to assume all of the authorities and responsibilities of section 401. EPA is soliciting comment on the proposed provisions, as well as comment on any alternative approaches.

In section V.E in this preamble, EPA discussed the term "any other appropriate requirement of State law." That discussion applies equally to tribal law for those tribes that obtain TAS status, either for section 401 in its entirely or only for section 401(a)(2). There is no reason to treat a tribe's laws differently than a state's laws with respect to their ability to form the legal basis for a certification decision or any conditions the tribe might find necessary to include in a certification. Once it attains TAS status, a tribe stands on equal footing with a state regarding its ability to carry out its functions under sections 401(a)(1), 401(d) and 401(a)(2). Accordingly, a tribe with TAS status under section 401(a)(2) may rely upon any of its water quality-related laws in deciding whether to issue a certification (or conditions) under sections 401(a)(1) and (d) or object to a Federal license or permit under section 401(a)(2).

M. Implementation Considerations

EPA recognizes that both certifying authorities and Federal agencies have existing regulations addressing implementation of section 401. For example, as discussed in section V.C in this preamble, the Agency is aware that some certifying authorities have regulations defining

the contents of a request for certification. As a result of this rulemaking effort, certifying authorities may choose to modify their existing regulations if certain proposed provisions are finalized (*e.g.*, they may choose to define the contents of a certification request in regulation instead of relying on EPA's proposed definition). Similarly, EPA is aware that the Corps, FERC, and EPA's NPDES program have separate section 401 implementation regulations addressing their respective licensing or permitting programs.[72] EPA expects that Federal agencies with existing section 401 implementing regulations will evaluate their regulations and other guidance documents to ensure consistency with this regulation. EPA is requesting comment on the types of implementation materials that EPA should develop to assist Federal agencies and certifying authorities to implement any proposed or alternative provisions discussed throughout this preamble.

VI. Economic Analysis

Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review), EPA has prepared an economic analysis (EA) to inform the public of potential effects associated with this proposed rulemaking. This analysis is not required by the CWA.

To support the proposed rulemaking, EPA prepared an EA and other related rule analyses to assess potential impacts of the rule. These analyses seek to evaluate the benefits and costs of the proposed rulemaking and the effects of the rule on vulnerable groups and small entities. The EA presents an overview of practice under the 1971 Rule and 2020 Rule (baselines),[73] a description of the proposed changes, and an assessment of the potential impacts of the proposed

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[72] *See e.g.*, 33 CFR 325.2 (water quality certification on section 404 permits); 18 CFR 4.34 (water quality certification on FERC hydropower licenses); 40 CFR 124.53 through 124.55 (water quality certification on EPA-issued NPDES permits).

[73] On October 21, 2021, the U.S. District Court for the Northern District of California issued an order remanding and vacating EPA's 2020 Rule. The vacatur was nationwide in scope, and the order required a temporary return to the 1971 Rule until EPA finalized a new certification rule. However, the U.S. Supreme Court issued a stay of the vacatur on April 6, 2022, which put the 2020 Rule back in effect pending the Ninth Circuit and potential Supreme Court appeal. Due to the stay of the vacatur pending appeal, EPA considers two baselines in the economic analysis.

rulemaking on project proponents, certifying authorities, and Federal agencies when transitioning from the baselines of regulatory practice to the new proposed requirements. Appendix A in the EA provides a plain-language comparison of the 1971 Rule, 2020 Rule, and proposed rulemaking provisions in a table format. Within the EA, the Agency included discussion of the environmental benefits and process costs with examples relative to the proposed rulemaking provisions. EPA also assessed environmental justice impacts of the proposed rulemaking on vulnerable communities and impacts on small entities. The Agency also prepared an Information Collection Request Supporting Statement which describes the overall burden of the section 401 regulations. *See* section VII.B in this preamble.

Section 401 certification decisions have varying effects on certifying authorities and project proponents. However, the Agency has limited data regarding the number of certification requests submitted and the certification decisions taken on certification requests (*i.e.*, whether the certification requests were granted, granted with conditions, denied, or waived). The Agency does not maintain a national database of certifying authority decisions and therefore did not have data available to perform a fully quantitative economic analysis. Given the absence of data related to section 401 regulations, EPA performed a qualitative analysis of the section 401 certification process under the 1971 Rule, the 2020 Rule, and under the proposed rulemaking.

The Agency reviewed information from several sources to characterize section 401 baseline conditions and understand potential impacts of the proposed regulatory changes. Specifically, the Agency investigated state and territory websites and assembled available information concerning section 401 fees and certification decisions. EPA also conducted a focused review of pre-proposal input letters[74] to extract any information concerning economic impacts of section 401 and key issues identified during implementation of section 401. Within the EA, EPA describes the various Federal licenses and permits that require section 401 certification and the potential actions that certifying authorities may take pursuant to their section

[74] Docket ID No. EPA-HQ-OW-2021-0302.

401 authority. Additionally, the Agency summarized the annual number of licenses and permits that require section 401 certification under different Federal authorities to determine the extent of licensing and permitting actions within the section 401 universe. These types of information are used in the EA to describe implementation practices and trends under the baselines and serve as the basis for assessing impacts of the proposed rulemaking.

In determining the potential effects of the proposed rulemaking, EPA described the impacts of rule revisions in several key areas including pre-filing meetings, contents of certification requests, time period for review, neighboring jurisdictions, and tribal provisions for implementing section 401. The 1971 Rule baseline did not include a pre-filing meeting request requirement. However, because pre-filing meetings allow for early discussion of project details, such meetings would ultimately be expected to reduce burden elsewhere in the section 401 certification process. The 2020 Rule does not provide certifying authorities with the option to waive or shorten the pre-filing meeting request requirement. The Agency anticipates that the proposed pre-filing meeting request provision would provide flexibility for certifying authorities to decide whether to require pre-filing meeting requests and whether to hold pre-filing meetings based on project complexity and other factors. Relative to both the 1971 Rule and 2020 Rule baselines, the Agency expects that the proposed requirement to include a copy of the draft license or permit with all requests for certifications would decrease the number of redundant and unnecessary certification conditions and increase the amount of relevant project-specific information available to the certifying authority promoting a more efficient certification review process. Additionally, relative to the two baselines, the proposed changes concerning the reasonable time for certification review would balance equities between certifying authorities and Federal agencies and provide flexibility for certifying authorities and Federal agencies to determine the optimal length for the reasonable period of time or any extensions, provided they do not exceed one year from receipt. For example, the proposed rulemaking would allow certifying authorities to ensure that the reasonable period of time is informed by the size and

complexity of the project, the certifying authority's available resources (*e.g.*, staff size), and public notice and comment requirements. Allowing the certifying authority and Federal agency to negotiate a reasonable period of time at the beginning of the certification process (subject to a 60-day default) is also likely to improve the efficiency of the review process. The proposed rule also provides greater clarity regarding the process to protect neighboring jurisdiction waters (*e.g.*, by specifying the contents of a notification from a Federal agency to EPA), which is also expected to increase its efficiency. This clarity and efficiency is expected when using the 1971 Rule as the baseline, as well as for the 2020 Rule baseline (though potentially to a lesser extent due to some updated provisions in the 2020 Rule). Neither the 1971 Rule nor the 2020 Rule included TAS provisions. Proposed revisions permitting tribes to obtain TAS solely for section 401 and, if desired, to only obtain TAS for the purpose of participating as neighboring jurisdictions under section 401(a)(2), would provide tribes with a greater ability to protect their water resources from the adverse effects of pollution from federally licensed or permitted projects.

In some areas, the proposed rulemaking would revive practices that had been widely implemented for 50 years before the 2020 Rule. Specifically, the proposal would return the scope of a certifying authority's section 401 review as encompassing the "activity as a whole," which is consistent with longstanding Agency and certifying authority practice and allows certifying authorities to protect their waters from the widest range of impacts. The Agency is proposing to put back a certification modification process, allowing certifying authorities and Federal agencies the flexibility to mutually agree on circumstances warranting modification. Provided that certification modification efforts are appropriately coordinated, the modification process under the proposed rulemaking would allow certifying authorities to adapt to changes in environmental and regulatory conditions, and provide needed flexibility to accommodate changed circumstances after issuance of a section 401 certification.

EPA anticipates that the proposed rulemaking will enhance the ability of states and tribes

to protect their water resources by clarifying key components of the water quality certification process and improving coordination between Federal agencies, certifying authorities, and project proponents. The Agency is seeking comment on the EA and information collection request, including the information used to inform the Agency's understanding of baseline conditions. Additionally, EPA is requesting comment on any additional data sources that can be used to characterize the baseline for section 401 implementation and serve as the basis for understanding the potential impacts of any of these proposed regulatory changes.

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at http://www.epa.gov/laws-regulations/laws-and-executive-orders.

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. The Agency prepared an economic analysis of the potential benefits and costs associated with this action. This analysis, the Economic Analysis for the Proposed Rule, is available in the docket for this action and is briefly summarized in section VI in this preamble.

B. Paperwork Reduction Act (PRA)

The information collection activities in this proposed rulemaking have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2603.06. A copy of the ICR is included in the docket for this rule, and it is briefly summarized here.

The information collected under section 401 is used by certifying authorities and EPA to evaluate potential water quality impacts from federally licensed or permitted projects. When states or tribes with TAS act as the certifying authority, the primary collection of this information

is performed by the Federal agencies issuing the licenses or permits or the states and tribes acting as certifying authorities. When EPA acts as the certifying authority or evaluates potential neighboring jurisdiction impacts, the information is collected by EPA. Information collected directly by EPA under section 401 in support of the section 402 NPDES program is already captured under existing ICR No. 0229.255 (OMB Control No. 2040-0004). The information collected under section 518(e) is used by EPA to determine whether a tribe is eligible for TAS for section 401 or section 401(a)(2). Information collected directly by EPA under section 518(e) in support of the process for tribes to obtain TAS for CWA section 303(c) and section 401 simultaneously is already captured under existing ICR No. 0988.14 (OMB Control No. 2040-0049).

The proposed revisions clarify the nature of the information project proponents must include in a request for section 401 certification. They also contain a pre-filing meeting request requirement for project proponents which may be waived or shortened by a certifying authority. The proposed revisions also provide tribes with the ability to obtain TAS solely for either section 401 or section 401(a)(2). Total annual burden for respondents (project proponents and certifying authorities and tribes applying for TAS) are anticipated to be 861,274 hours with the associated annual labor costs being approximately $47 million. EPA expects that these proposed revisions will provide additional transparency in the certification modification and section 401(a)(2) contexts. EPA expects these proposed revisions to provide greater clarity regarding section 401 requirements, to reduce the overall preparation time spent by a project proponent on certification requests, and to reduce the review time for certifying authorities. EPA solicits comment on whether there are ways it can increase clarity, reduce the information collection burden, or improve the quality or utility of the information collected, or the information collection process itself, in furtherance of goals and requirements of section 401.

In the interest of transparency, EPA is providing the following summary of the relevant portions of the burden assessment associated with EPA's existing certification regulations. EPA

does not expect any measurable change in information collection burden associated with the proposed rulemaking changes.

Respondents/affected entities: Project proponents, state and tribal reviewers (certifying authorities), tribes applying for TAS.

Respondent's obligation to respond: Required to obtain section 401 water quality certification; voluntary for tribes to apply for TAS

Estimated number of respondents: 154,006 responses from 72,125 respondents annually.

Frequency of response: Variable (one per Federal license or permit application, or only once) depending on type of information collected.

Total estimated burden: 861,274 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $47 million (per year), includes $0 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. The EPA will respond to any ICR-related comments in the final rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under Review - Open for Public Comments" or by using the search function. OMB must receive comments no later than [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

C. Regulatory Flexibility Act (RFA)

I certify that this proposed rulemaking will not have a significant economic impact on a

substantial number of small entities under the RFA. The small entities subject to the requirements of this action are small businesses applying for Federal licenses or permits subject to section 401 certification, which includes construction, manufacturing, mining, and utility businesses. Section 401 requires project proponents to obtain a water quality certification from the certifying authority where the potential discharge originates or will originate before it may obtain such Federal license or permit. Small entities are not subject to economic impacts from the proposed rule's requirements on certifying authorities, Federal agencies, or neighboring jurisdictions because small entities do not act in those roles under section 401.

EPA is not able to quantify the impacts of the proposed rulemaking on small entities due to several data limitations and uncertainties, which are described within the Economic Analysis for the Proposed Rule, available in the docket for this rulemaking. However, EPA is including a qualitative assessment of the potential impacts of the proposed rulemaking on project proponents that are small entities in the Economic Analysis. Based on the qualitative analysis, the Agency has determined that some small entities may experience some impact from the proposed rulemaking but that the impact would not be significant. *See* the Economic Analysis for details of the qualitative analysis.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. While this action creates enforceable duties for the private sector, the cost does not exceed $100 million or more. This action does not create enforceable duties for state and tribal governments. See the Economic Analysis in the docket for further discussion on UMRA.

E. Executive Order 13132: Federalism

Under the technical requirements of Executive Order 13132 (64 FR 43255, August 10, 1999), EPA has determined that this proposed rulemaking does not have federalism implications

but expects that this proposed rulemaking may be of significant interest to state and local governments.

EPA is proposing updates to its CWA section 401 regulation to provide greater clarity and flexibility for certifying authorities in relation to acting on pre-filing meeting requests, contents of requests for certification, and acting within the reasonable period of time. EPA is also proposing to clarify the scope of Federal agency review of certification decisions; however, nothing in EPA's proposed rulemaking would preempt state law. These proposed regulatory clarifications and revisions will reinforce the authority granted to states by CWA section 401 to protect their water quality, which had been exercised by the states prior to implementation of the 2020 Rule.

Prior to proposing this rule, EPA solicited recommendations and conducted pre-proposal outreach, such as virtual listening sessions, where many state and local governments, intergovernmental associations, and other associations representing state and local governments participated. Specifically, EPA hosted webinar-based listening sessions for pre-proposal input on June 14, June 15, June 23, and June 24, 2021, with over 400 participants from most states and a few territories. Furthermore, EPA accommodated requests for listening sessions with representatives from the Association of Clean Water Administrators, the Association of State Wetland Managers, the Environmental Council of the States, Western States Water Council, Indiana Department of Environmental Management, Maryland Department of the Environment, New Mexico Environmental Department, New York Department of Environmental Conservation, Oregon Department of Environmental Quality, Virginia Department of Environmental Quality, and Washington Department of Ecology. All pre-proposal input letters and summaries of the webinar-based listening sessions are available in Docket ID No. EPA-HQ-OW-2021-0302. These webinars, meetings, and input letters provided a wide and diverse range of interests, positions, and recommendations to the Agency. The pre-proposal feedback from certifying authorities covered eight of the issues the EPA identified in the *Federal Register*

document. *See* 86 FR 29543-44. Generally, participants advocated for states to have increased authority and flexibility to determine the needs and requirements for certification requests. In addition, states asked EPA to clarify definitions and conveyed support for interim guidance and immediate relief as they continued to implement the 2020 Rule.

After publishing this proposed rulemaking, EPA will conduct additional outreach and engagement with state and local government officials, or their representative national organizations, prior to finalizing a rule. All comment letters and recommendations received by EPA during the comment period from state and local governments will be included in the proposed rulemaking docket (Docket ID No. EPA-HQ-OW-2022-0128).

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action may have implications for tribal governments. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action may change how tribes with TAS for section 401 administer the section 401 program, but it will not have an administrative impact on tribes on whose behalf EPA issues certifications. As discussed in the preamble, EPA expects this proposal to expand and further clarify the opportunities for tribal participation in the CWA section 401 water quality certification process.

EPA consulted with tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this proposed rulemaking to allow them to have meaningful and timely input into its development.

The Agency initiated a tribal consultation and coordination process before proposing this rule by sending a "Notification of Consultation and Coordination" letter, dated June 7, 2021, to all 574 of the tribes federally recognized at that time (*see* Docket ID No. EPA-HQ-OW-2021-0302). The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process for this rulemaking. In addition to two

national tribal webinars held on June 29 and July 7, 2021, the Agency convened other listening sessions, that tribal members and representatives attended, for certifying authorities and the public. EPA continued outreach and engagement with tribes and sought other opportunities to provide information and hear feedback from tribes at national and regional tribal meetings during and after the end of the consultation period. The Agency did not receive any consultation requests. All tribal and tribal organization letters and webinar feedback are included in the pre-proposal docket (Docket ID No. EPA-HQ-OW-2021-0302), and a summary of the tribal consultation and coordination effort may be found in the docket for this action (Docket ID No. EPA-HQ-OW-2022-0128).

Many tribal feedback letters or meeting participants expressed an interest in receiving additional information and in continued engagement with the Agency during development of the proposed rulemaking; however, most of these tribal representatives highlighted other ongoing rulemakings that also required their engagement. Common themes expressed in the tribal feedback letters included the need for applicants to submit complete certification requests, expanding the scope of certifications, cooperative federalism, concerns about a Federal agency's unilateral ability to determine the reasonable period of time, and concerns about Federal agencies waiving certifying authority decisions. Feedback was relatively consistent across these stakeholders regardless of whether the feedback was from tribes having TAS or not.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect

Energy Supply, Distribution, or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

This proposed rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Economic Analysis for the Proposed Rule, which can be found in the docket for this action and is briefly summarized in section VI in this preamble.

The Agency recognizes that the burdens of environmental pollution disproportionately fall on population groups of concern (*e.g.*, minority, low-income, and indigenous populations as specified in Executive Order 12898), and EPA is responsive to environmental justice concerns through multiple provisions in this proposal. The proposed pre-filing meeting request requirement provides a mechanism to ensure certifying authorities can request and receive information needed to protect their water resources and population groups of concern during early engagement. Additionally, the proposal to include a copy of the draft permit or license in a "request for certification" empowers certifying authorities with more details upfront about the project to make a well-informed decision that may affect population groups of concern, promoting environmental justice and transparency in the certification process. This also enables certifying authorities to share a greater level of detail with the public (including population groups of concern that may be impacted by a proposed project), so that participants in the public

notice and comment process can provide better informed input.[75] Under the proposed collaborative approach for determining the reasonable period of time, certifying authorities can take the needs of population groups of concern into account when determining the amount of time they need to review and evaluate the potential impacts of a proposed project on the communities' water resources (*e.g.*, a certifying authority may suggest a longer reasonable period of time to facilitate outreach to population groups of concern or to conduct studies on a proposed project's impact on these communities). Additionally, the "activity as a whole" approach for scope of review has the potential to benefit population groups of concern by ensuring that the certifying authority can broadly review the potential water quality impacts on those communities. The proposed TAS provisions for section 401 as a whole or for section 401(a)(2) give tribes additional options to obtain TAS, as well as more opportunities to provide input and voice any water quality concerns during the certification process. Lastly, when EPA is acting as the certifying authority, the Agency is proposing to update the public notice provision to facilitate participation by the broadest number of potentially interested stakeholders, including population groups of concern. These proposed approaches and their responsiveness to environmental justice concerns is further discussed within the environmental justice section of the Economic Analysis.

List of Subjects

40 CFR Part 121

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Water pollution control.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution

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[75] Under section 401(a)(1), a certifying authority is required to provide public notice on a request for certification.

control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Michael S. Regan,

Administrator.

For the reasons set out in the preamble, EPA proposes to amend 40 CFR parts 121, 122, and 124 as follows:

1. Revise part 121 to read as follows:

PART 121—STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

Sec.

Subpart D—Review and Advice

121.18 Review and advice.

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—General

§ 121.1 Definitions.

As used in this part, the following terms shall have the meanings indicated:

(a) *Activity as a whole* means any aspect of the project activity with the potential to affect water quality.

(b) *Administrator* means the Administrator, Environmental Protection Agency (EPA).

(c) *Application* means an application for a license or permit submitted to a Federal agency, or if available, the draft license or permit.

(d) *Certifying authority* means the entity responsible for certifying compliance with applicable water quality requirements in accordance with Clean Water Act section 401.

(e) *Federal agency* means any agency of the Federal Government to which application is made for a license or permit that is subject to Clean Water Act section 401.

(f) *Federal Indian Reservation*, *Indian reservation*, or *reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(g) *Indian Tribe* or *Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian Reservation.

(h) *License* or *permit* means any license or permit issued or granted by an agency of the Federal Government to conduct any activity which may result in any discharge into waters of the United

States.

(i) *Neighboring jurisdiction* means any state, or tribe with treatment in a similar manner as a state for Clean Water Act section 401 in its entirety or only for Clean Water Act section 401(a)(2), other than the jurisdiction in which the discharge originates or will originate.

(j) *Project proponent* means the applicant for a license or permit or the entity seeking certification.

(k) *Receipt* means the date that a request for certification, as defined by the certifying authority, is documented as received by a certifying authority in accordance with the certifying authority's applicable submission procedures.

(l) *Regional Administrator* means the Regional designee appointed by the Administrator, Environmental Protection Agency.

(m) *Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or tribal law.

§ 121.2 When certification is required.

Certification or waiver is required for any license or permit that authorizes an activity which may result in a discharge from a point source into a water of the United States.

§ 121.3 Scope of certification.

When a certifying authority reviews a request for certification, it shall evaluate whether the activity as a whole will comply with all applicable water quality requirements.

§ 121.4 Pre-filing meeting requests.

The project proponent shall request a pre-filing meeting from a certifying authority at least 30 days prior to submitting a request for certification in accordance with the certifying authority's applicable submission procedures, unless the certifying authority waives or shortens the

requirement for a pre-filing meeting request.

§ 121.5 Request for certification.

(a) A request for certification shall be in writing, signed, and dated and shall include a copy of the draft license or permit (unless legally precluded from obtaining a copy of the draft license or permit) and any existing and readily available data or information related to potential water quality impacts from the proposed project.

(b) Where a project proponent is seeking certification from the Regional Administrator, a request for certification shall also include the additional contents identified in paragraph (c) of this section. Where a project proponent is seeking certification from a certifying authority other than the Regional Administrator, and that certifying authority has not identified in regulation additional contents of a request for certification, the project proponent shall submit a request for certification as defined in paragraph (c) of this section.

(c) A request for certification submitted to the Regional Administrator shall include the following, if not already included in the draft license or permit:

(1) The name and address of the project proponent;

(2) The project proponent's contact information;

(3) Identification of the applicable Federal license or permit, including Federal license or permit type, project name, project identification number, and a point of contact for the Federal agency;

(4) Where applicable, a list of all other Federal, interstate, tribal, state, territorial, or local agency authorizations required for the proposed activity and the current status of each authorization; and

(5) Documentation that a pre-filing meeting request was submitted to the certifying authority in accordance with applicable submission requirements, unless a pre-filing meeting request has been waived.

(d) A certifying authority shall send written confirmation of the date of receipt of the request for certification to the project proponent and Federal agency.

§ 121.6 Reasonable period of time.

(a) The reasonable period of time shall begin upon receipt of a request for certification.

(b) The Federal agency and the certifying authority may, within 30 days of receipt of a request for certification, jointly agree in writing to a reasonable period of time for the certifying authority to act on the request for certification, provided the reasonable period of time does not exceed one year from receipt.

(c) If the Federal agency and the certifying authority do not agree on the length of a reasonable period of time within 30 days of receipt of a request for certification, the reasonable period of time shall be 60 days. If a longer period of time is necessary to accommodate the certifying authority's public notice requirements or force majeure events (including, but not limited to, government closure or natural disasters), upon notification by the certifying authority prior to the end of the reasonable period of time, the reasonable period of time shall be extended by the period of time necessitated by public notice requirements or the force majeure event. In its notification, the certifying authority shall provide the Federal agency with a justification for such extension in writing. Such an extension may not exceed one year from receipt of the certification request.

(d) The Federal agency and certifying authority, after consulting with the project proponent, may agree to extend the reasonable period of time in writing for any other reason, provided the reasonable period of time as extended does not exceed one year from receipt of the request for certification.

§ 121.7 Certification decisions.

(a) A certifying authority may act on a request for certification in one of four ways: grant certification, grant certification with conditions, deny certification, or expressly waive certification.

(b) A certifying authority shall act on a request for certification within the scope of certification, as defined at § 121.3, and within the reasonable period of time, as determined pursuant to § 121.6.

(c) A grant of certification by a certifying authority shall be in writing and include the following:

(1) Name and address of the project proponent and identification of the applicable Federal license or permit; and

(2) A statement that the activity as a whole will comply with water quality requirements.

(d) A grant of certification with conditions by a certifying authority shall be in writing and include the following:

(1) Name and address of the project proponent and identification of the applicable Federal license or permit;

(2) Any conditions necessary to assure that the activity as a whole will comply with water quality requirements; and

(3) A statement explaining why each of the included conditions is necessary to assure that the activity as a whole will comply with water quality requirements.

(e) A denial of certification by a certifying authority shall be in writing and include the following:

(1) Name and address of the project proponent and identification of the applicable Federal license or permit; and

(2) A statement explaining why the certifying authority cannot certify that the activity as a whole will comply with water quality requirements.

(f) An express waiver by a certifying authority shall be in writing and include the following:

(1) Name and address of the project proponent and identification of the applicable Federal license or permit; and

(2) A statement stating that the certifying authority expressly waives its authority to act on a request for certification.

(g) If the certifying authority determines that no water quality requirements are applicable to the activity as a whole, the certifying authority shall grant certification.

§ 121.8 Failure or refusal to act.

The certification requirement shall be waived if a certifying authority fails or refuses to act on a request for certification in accordance with § 121.7(a) within the reasonable period of time, as defined at § 121.6.

§ 121.9 Federal agency review.

(a) To the extent a Federal agency reviews a certification decision for compliance with Clean Water Act section 401, its review is limited to evaluating whether:

(1) The certification decision indicates whether it is a grant, grant with conditions, denial, or express waiver;

(2) The proper certifying authority issued the certification decision;

(3) The certifying authority provided public notice on the request for certification; and

(4) The certification decision was issued within the reasonable period of time, as defined at § 121.6.

(b) If a Federal agency determines that a certification decision does not meet the elements identified in paragraph (a)(1) or (3) of this section, the Federal agency shall notify the certifying authority and provide the certifying authority with an opportunity to ensure that its certification decision meets those elements. If necessary, the reasonable period of time shall be extended to provide the certifying authority with such an opportunity, but in no case shall the reasonable period of time exceed one year from the receipt of the certification request.

(c) If a Federal agency determines that a certification decision does not meet the element identified in paragraph (a)(4) of this section, the Federal agency shall notify the certifying authority and project proponent in writing that the certification requirement has been waived in accordance with § 121.8. Such notice shall satisfy the project proponent's obligations under Clean Water Act section 401.

§ 121.10 Modifications.

(a) The certifying authority may not:

(1) Revoke or modify a denial of certification;

(2) Revoke or modify a waiver of certification;

(3) Revoke a grant of certification (with or without conditions); or

(4) Modify a grant of certification (with or without conditions) into a denial or waiver of certification.

(b) Provided that the Federal agency and the certifying authority agree in writing that the certifying authority may modify a grant of certification (with or without conditions), the certifying authority may modify the agreed upon portions of the certification.

§ 121.11 Requirements for Indian Tribes to administer a water quality certification program.

(a) The Regional Administrator may accept and approve a tribal application for purposes of administering a water quality certification program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 121.1(f) and (g);

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(3) The water quality certification program to be administered by the Indian Tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality certification program in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations.

(b) Requests by an Indian Tribe for administration of a water quality certification program should be submitted to the appropriate EPA Regional Administrator. The application shall include the following information, provided that where the Tribe has previously qualified for eligibility or "treatment as a state" under another EPA-administered program, the Tribe need only provide the required information that has not been submitted in a previous application:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of tribal government;

(ii) Describe the types of governmental functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Tribe asserts authority to regulate surface water quality; and

(ii) A statement by the Tribe's legal counsel or equivalent official that describes the basis for the Tribe's assertion of authority and may include copies of

documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the Tribe's assertion of authority.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality certification program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience that may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.), the Indian Mineral Development Act (25 U.S.C. 2101, et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and implementing a water quality certification program; and

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality certification program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a tribal application.

(c) The procedure for processing a Tribe's application is as follows:

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to paragraph (b) of this section in a timely manner. The Regional Administrator shall promptly notify the Indian Tribe of receipt of the application.

(2) Except as provided in paragraph (c)(4) of this section, within 30 days after receipt of the Tribe's application, the Regional Administrator shall provide appropriate notice. The notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters;

(ii) Be provided to all appropriate governmental entities; and

(iii) Provide 30 days for comments to be submitted on the tribal application. Comments shall be limited to the Tribe's assertion of authority.

(3) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of paragraph (a)(3) of this section.

(4) Where, after [EFFECTIVE DATE OF FINAL RULE], EPA has determined that a Tribe qualifies for treatment in a similar manner as a state for the Clean Water Act section 303(c) Water Quality Standards Program, Clean Water Act section 303(d) Impaired Water Listing and Total Maximum Daily Loads Program, Clean Water Act section 402 National Pollutant Discharge Elimination System Program, or Clean Water Act section 404 Dredge and Fill Permit Program, and has provided notice and an opportunity to comment on the Tribe's assertion of authority to appropriate governmental entities as part of its review of the Tribe's prior application, no further notice to governmental entities, as described in paragraph (c)(2) of this section, shall be provided with regard to the same Tribe's application for the water quality certification program,

unless the application presents to the EPA Regional Administrator different jurisdictional issues or significant new factual or legal information relevant to jurisdiction.

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, they shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the water quality certification program.

(d) An Indian Tribe may submit a tribal application for purposes of administering only the Clean Water Act section 401(a)(2) portion of a water quality certification program.

Subpart B—Neighboring Jurisdictions

§ 121.12 Notification to the Regional Administrator.

(a) Within five days of the date that it has received both the application and either a certification or waiver for a Federal license or permit, the Federal agency shall provide written notification to the Regional Administrator.

(1) The notification shall include a copy of the certification or waiver and the application for the Federal license or permit.

(2) The notification shall also contain a general description of the proposed project, including but not limited to, permit or license identifier, project location (e.g., latitude and longitude), a project summary including the nature of any discharge and size or scope of activity, and whether the Federal agency is aware of any neighboring jurisdiction providing comment about the project. If the Federal agency is aware that a neighboring jurisdiction provided comment about the project, it shall include a copy of those comments in the notification.

(b) If the Regional Administrator determines there is a need for supplemental information to make a determination about potential neighboring jurisdiction effects pursuant to Clean Water Act section 401(a)(2), the Regional Administrator may make a written request to the Federal agency that such information be provided in a timely manner for EPA’s determination, and the

Federal agency shall obtain that information from the project proponent and forward the additional information to the Administrator within such timeframe.

(c) The Regional Administrator may enter into an agreement with a Federal agency regarding the manner of this notification process and the provision of supplemental information.

§ 121.13 Determination of effects on neighboring jurisdictions.

(a) Within 30 days after the Regional Administrator receives notice in accordance with § 121.12(a), the Regional Administrator shall determine whether a discharge from the certified or waived project may affect water quality in a neighboring jurisdiction.

(b) If the Regional Administrator determines that the discharge from the project may affect water quality in a neighboring jurisdiction, within 30 days after receiving notice in accordance with § 121.12(a), the Regional Administrator shall notify the neighboring jurisdiction, the certifying authority, the Federal agency, and the project proponent in accordance with paragraph (c) of this section.

(c) Notification from the Regional Administrator shall be in writing and shall include:

(1) A statement that the Regional Administrator has determined that a discharge from the project may affect the neighboring jurisdiction's water quality;

(2) A copy of the license or permit application and related certification or waiver; and

(3) A statement that the neighboring jurisdiction has 60 days to notify the Regional Administrator, the Federal agency, and the certifying authority, in writing, whether it has determined that the discharge will violate any of its water quality requirements, to object to the issuance of the Federal license or permit, and to request a public hearing from the Federal agency.

(d) A Federal license or permit may not be issued pending the conclusion of the process described in §§ 121.14 and 121.15.

§ 121.14 Neighboring jurisdiction objection and request for a public hearing.

(a) If the neighboring jurisdiction determines that a discharge will violate any of its water quality requirements, within 60 days after receiving notice in accordance with § 121.13(c), the neighboring jurisdiction shall notify the Regional Administrator, the Federal agency, and the certifying authority in accordance with paragraph (b) of this section.

(b) Notification from the neighboring jurisdiction shall be in writing and shall include:

(1) A statement that the neighboring jurisdiction objects to the issuance of the Federal license or permit;

(2) An explanation of the reasons supporting the neighboring jurisdiction's determination that the discharge will violate its water quality requirements, including but not limited to, an identification of those water quality requirements that will be violated; and

(3) A request for a public hearing from the Federal agency on its objection.

§ 121.15 Public hearing and Federal agency evaluation of neighboring jurisdiction objection.

(a) Upon a request for hearing from a neighboring jurisdiction in accordance with § 121.14(b), the Federal agency shall hold a public hearing on the neighboring jurisdiction's objection to the license or permit.

(b) The Federal agency shall provide public notice at least 30 days in advance of the hearing.

(c) At the hearing, the Regional Administrator shall submit to the Federal agency its evaluation and recommendation(s) concerning the objection.

(d) The Federal agency shall consider recommendations from the neighboring jurisdiction and the Regional Administrator, and any additional evidence presented to the Federal agency at the hearing, and determine whether additional license or permit conditions may be necessary to ensure that any discharge from the project will comply with the neighboring jurisdiction's water quality requirements. If such conditions may be necessary, the Federal agency shall include them in the license or permit.

(e) If additional license or permit conditions cannot ensure that the discharge from the project will comply with the neighboring jurisdiction's water quality requirements, the Federal agency shall not issue the license or permit.

Subpart C—Certification by the Administrator

§ 121.16 When the Administrator certifies.

(a) Certification or waiver by the Administrator is required where no state, tribe, or interstate agency has authority to give such a certification.

(b) When acting pursuant to this section, the Administrator shall comply with the requirements of Clean Water Act section 401 and this part.

§121.17 Public notice and hearing.

(a) Within 20 days of receipt of a request for certification, the Administrator shall provide public notice of receipt of a request for certification. Following such public notice, the Administrator shall provide an opportunity for public comment.

(b) If the Administrator determines that a public hearing on a request for certification is appropriate or necessary, the Administrator shall schedule such hearing at an appropriate time and place and, to the extent practicable, give all interested and potentially affected parties the opportunity to present evidence or testimony in person or by other means.

Subpart D—Review and Advice

§ 121.18 Review and advice.

Upon the request of any Federal agency, certifying authority, or project proponent, the Administrator shall provide any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any Federal agency, certifying authority, or project proponent, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

PART 122 – EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

2. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq*.

3. Section 122.4 is amended by revising paragraph (b) to read as follows:

§122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) When the applicant is required to obtain a State or other appropriate certification under section 401 of the CWA and that certification has not been obtained or waived;

* * * * *

4. Section 122.44 is amended by revising paragraph (d)(3) to read as follows:

§122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(d) * * *

(3) Conform to the conditions in a State certification under section 401 of the CWA when EPA is the permitting authority;

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

5. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.; Safe Drinking Water Act, 42 U.S.C. 300f et seq.; Clean Water Act, 33 U.S.C. 1251 et seq.; Clean Air Act, 42 U.S.C. 7401 et seq.

6. Section 124.53 is amended by:

a. Removing paragraphs (b), (c), and (e);

b. Redesignating paragraph (d) as paragraph (b); and

c. Revising newly redesignated paragraph (b).

The revision reads as follows:

§ 124.53 State certification.

* * * * *

(b) State certification shall be granted or denied within the reasonable period of time as required under CWA section 401(a)(1). The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

7. Section 124.54 is amended by revising paragraphs (a) and (b) to read as follows:

§ 124.54 Special provisions for State certification and concurrence on applications for section 301(h) variances.

(a) When an application for a permit incorporating a variance request under CWA section 301(h) is submitted to a State, the appropriate State official shall either:

(1) Deny the request for the CWA section 301(h) variance (and so notify the applicant and EPA) and, if the State is an approved NPDES State and the permit is due for reissuance, process the permit application under normal procedures; or

(2) Forward a copy of the certification required under CWA section 401(a)(1) to the Regional Administrator.

(b) When EPA issues a tentative decision on the request for a variance under CWA section

301(h), and no certification has been received under paragraph (a) of this section, the Regional Administrator shall forward the tentative decision to the State. If the State fails to deny or grant certification and concurrence under paragraph (a) of this section within the reasonable period of time provided in CWA section 401(a)(1), certification shall be waived and the State shall be deemed to have concurred in the issuance of a CWA section 301(h) variance.

* * * * *

8. Section 124.55 is amended by:

a. Revising paragraph (a);

b. Removing paragraph (b);

c. Redesignating paragraphs (c), (d), (e), and (f) as paragraphs (b), (c), (d), and (e) respectively; and

d. Revising newly redesignated paragraphs (b) and (c).

The revisions read as follows:

§ 124.55 Effect of State certification.

(a) When certification is required under CWA section 401(a)(1), no final permit shall be issued:

(1) If certification is denied; or

(2) Unless the final permit incorporates the conditions specified in the certification.

(b) A State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition.

(c) A condition in a draft permit may be changed during agency review in any manner consistent with a corresponding certification. No such changes shall require EPA to submit the permit to the State for recertification.

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